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LAW OF REAL PROPERTY.



A MANUAL

OF THE

LAW OF REAL PROPERTY.

INCLUDING, ALSO,

GENERAL RULES OF LAW RELATING TO THE PURCHASE AND SALE OF REAL PROPERTY,

OR

LAW OF VENDOR AND PURCHASER.

AS DETERMINED BY THE LEADING COURTS OF ENGLAND AND THE UNITED STATES.

By CHARLES T. BOONE, LL. B.,
AUTHOR OF "LAW OF CORPORATIONS," ETC.

SAN FRANCISCO:
SUMNER WHITNEY & COMPANY.
1883.

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PREFACE.

In the preparation of this work, the author has pursued the same general plan adopted and sought to be carried out in preparing his preceding work on the "Law of Corporations"; namely, to offer the profession the law as it exists to-day, divested of all obsolete doctrines, in a form readily accessible and free from fruitless disquisition. The work is not a digest, nor is it a treatise, strictly speaking; but a plain, concise, and what the author believes to be an accurate embodiment of the law relating to the title of which it treats, as ascertained in the light of the best American and English authorities. Should the profession accord the work the same flattering reception extended to the author's previous efforts in the same direction, he will feel that his continued labors in aid of the overworked lawyer have not been in vain.

CHARLES T. BOONE.

San Francisco, Cal., July 5, 1883.

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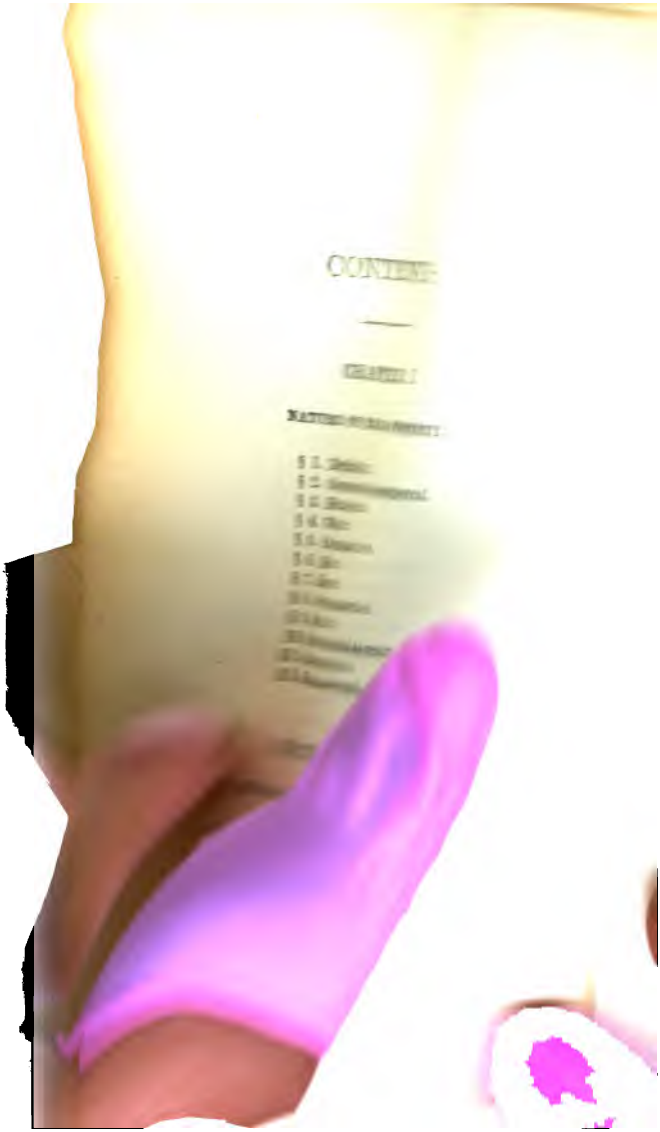
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§ 1. Definition.—Real property is something which may be held by tenure, or will pass to the heir of the possessor at his death, instead of his executor;[1] and it includes lands, tenements, and hereditaments.[2] The word "land" includes not only the surface of the earth, but everything under it or over it;[3] the maxim of the law being *cujus est solum, ejus est usque ad cœlum.*[4] Tenement is a word of greater extent than land, and signifies every thing of a permanent nature that may be holden by a tenure,[5] whether it be of a substantial and sensible kind, as lands or houses,[6] or of an unsubstantial, ideal kind, as offices, rents, commons, and the like.[7] Hereditament is a term of still greater extent, and comprehends not only lands and tenements, but whatever may be in-

herited.[8] In American statute law, the phrase "lands, tenements, and hereditaments" is usually employed to denote "real estate."[9] But in some of the States, the terms "land" and "real estate" are said to include "lands, tenements, and hereditaments, and all rights thereto and interests therein;[10] and some extend the term "real estate" so as to include chattels real.[11]

1 1 Atk. Conv.; 2 Bouv. Dict. 413. Compare Meason's Est. 4 Watts, 346; Buckeridge v. Ingram, 2 Ves. Jr. 651; Wind v. Iekyl, 1 P. Wms. 575.

2 Co. Litt. 4 *a*; 2 Blackst. Com. 16; Van Rensselaer v. Poucher, 4 Denio, 35.

3 2 Blackst. Com. 17, 18; Green v. Armstrong, 1 Denio, 554; Mott v. Palmer, 1 N. Y. 569.

4 2 Blackst. Com. 18; Broom, Max. 289, 293; Auburn etc. Road Co. v. Douglass, 9 N. Y. 444.

5 Co. Litt. 6 *a*; 2 Blackst. Com. 17; Sacket v. Wheaton, 17 Pick. 103. Compare Wright v. Denn, 10 Wheat. 204.

6 Co. Litt. 6 *a*; Sacket v. Wheaton, 17 Pick. 105.

7 Co. Litt. 6 *a*; 2 Blackst. Com. 17. The word "tenement" is frequently used in a restricted sense, as signifying a house or building: Sacket v. Wheaton, 17 Pick. 103.

8 1 Prest. Est. 12, 13; 1 Inst. 6; 2 Blackst. Com. 17; Canfield v. Ford, 28 Barb. 336.

9 See 1 N. Y. Rev. Stats. 750, § 10; Code Civ. Proc. § 2514, subd. 13; Wright v. Douglass, 2 N. Y. 376; Jenkins v. Fahey, 73 N. Y. 362.

By the Civil Code of California—

§ 657. Property is either—
1. Real or immovable; or,
2. Personal or movable.

§ 658. Real or immovable property consists of—
1. Land;
2. That which is affixed to land;
3. That which is incidental or appurtenant to land;
4. That which is immovable by law.

§ 659. Land is the solid material of the earth, whatever may be the ingredients of which it is composed; whether soil, rock, or other substance.

§ 660. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

§ 661. Sluice-boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine.

§ 662. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit; as in the case of a way, or water-course, or of a passage for light, air, or heat from or or across the land of another.

§ 663. Every kind of property that is not real is personal.

10 Mass. Gen. Stat. c. 3, § 7.

11 Missouri Rev. Stat. c. 32, § 49.

§ 2. Corporeal or incorporeal.—A familiar division of real property is into corporeal or incorporeal.[1] The former consists wholly of substantial and permanent objects, all which may be comprehended under the general denomination of land;[2] the latter consists of rights and profits arising from or annexed to land; such as rents, estovers, common,[3] easements,[4] or any other profits whatever, granted out of land, which savor of the realty.[5]

1 2 Blackst. Com. 17.

2 Co. Litt. 4, *et seq.*; 2 Blackst. Com. 17, 18; and see Sudbury *v.* Jones, 8 Cush. 189; Caldwell *v.* Fulton, 31 Pa. St. 475.

3 2 Blackst. Com. 21, *et seq.*; and see Chesapeake etc. Canal Co. *v.* Baltimore etc. R. R. Co. 4 Gill & J. 1; Dunlap *v.* Gibbs, 4 Yerg. 94; Van Rensselaer *v.* Dennison, 35 N. Y. 393, 400.

4 Cross *v.* Lewis, 2 B. & C. 686; Hewlins *v.* Shipman, 5 B. & C. 221; Ray *v.* Sweeney, 14 Bush, 1.

5 Coombs *v* Jordon, 3 Bland Ch. 284; 22 Am. Dec. 236; Mitchell *v.* Warner, 5 Conn. 518; Allen *v.* McKean, 1 Sum. 301. Corporeal hereditaments are said to "lie in livery"; incorporeal "in grant": Wms. Real Prop. 195.

§ 3. Heir-looms.—In England there is a class of chattels which by custom descend to the heir with the real estate, and are called "heir-looms."[1] They are generally such things as cannot be taken away without injury to the inheritance;[2] as, for instance, deer in a park, fishes in a pond, rabbits in a warren, or doves in a dove-house.[3] So the ancient jewels of the crown are held to be heir-looms.[4] So of charters, court-rolls, deeds, and other evidences of the land, together with the chests and boxes containing them.[5] So of family pictures.[6] So it seems that journals of the House of Lords, delivered to a peer, descend with the title, as heir-looms.[7] And an ancient horn which had immemorially gone with the estate, and which had been delivered to the plaintiff's ancestors to hold their land by, was held to be an heir-loom.[8]

1 See 2 Blackst. Com. 17, 427; Co. Litt. 18 *b*; Byng *v.* Byng, 10 H. L. Cas. 183; Spooner *v.* Brewster, 3 Bing. 136.

2 2 Blackst. Com. 427; Co. Litt. 388.

3 Co. Litt. 8; 2 Blackst. Com. 427, 428; Ford *v.* Tynte, 2 Johns. & H. 150. Compare Morgan *v.* Abergavenny, 8 Com. B. 768.

4 Co. Litt. 18.

5 2 Blackst. Com. 428.

6 Liford's Case, 11 Coke, 50.

7 Upton *v.* Lord Ferrars, 5 Ves. 806.

8 See Pusey *v.* Pusey, 1 Vern. 273; Conduit *v.* Soane, 1 Colles, 255. The court has no jurisdiction to order a sale of heir-looms which are settled in strict settlement, simply on the ground that a sale would be for the benefit of all parties interested: D'Eyncourt *v.* Gregory, Law R. 3 Ch. Div. 635; 18 Eng. R. 737.

§ 4. Water.—Water is a movable, wandering thing, and is said not to be susceptible of absolute ownership.[1] It admits only of a transient, usufructuary property, and is not capable of being sued for by the name of water, but the suit must be brought for the land that lies at the bottom covered with water.[2] It has however been held, that the right which a party has to the use of water flowing over his own land is undoubtedly identified with the realty, and is a real or corporeal hereditament, and not an easement.[3] It is an incident of his land to the extent that he has the right to have it continue to flow in its natural course, subject to such changes only as may be occasioned by such use of it as the law allows the various proprietors to make as it passes along.[4] Waters percolating in the soil belong to the owner of the freehold, and he may use them as he chooses, free from any usufructuary rights in others.[5] And in the Pacific States and Territories a right to running waters on the public lands of the United States, for purposes of irrigation, may be acquired by prior appropriation, as against parties not having the title of the Government.[6] When the water of a flowing stream, running in its natural channel, is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the steam, and he has the right to prevent its removal.[7] It has however been held, that a sale of ice ready formed in a pond is a sale of personalty.[8]

1 Co. Litt. 4 *a*; 2 Blackst. Com. 395; Brown *v.* Best, 1 Wils. 174.

2 2 Blackst. Com. 18; Mitchell *v.* Warner, 5 Conn. 497, 518; Green *v.* Armstrong, 1 Denio, 554.

3 Cary *v.* Daniels, 5 Met. 236.

4 Vansickle v. Haines, 7 Nev. 249. And see Mayor etc. v. Appold, 42 Md. 442; Corning v. Troy Nail Factory, 40 N. Y. 191; Dumont v. Kellogg, 29 Mich. 420; 18 Am. R. 102; Shamleffer v. Council Grove, 18 Kan. 24; Gardner v. Newburgh, 2 Johns. Ch. 161; 7 Am. Dec. 526; McCalmont v. Whitaker, 3 Rawle, 84; 23 Am. Dec. 102; Mason v. Hill, 3 Barn. & Adol. 312; Swindon Water Works v. Wilts Nav. Co. 7 H. L. Cas. 697; 14 Eng. R. 86.

5 Wilson v. New Bedford, 108 Mass. 261; 11 Am. R. 352; Hanson v. McCue, 42 Cal. 303; 10 Am. R. 299.

6 Basey v. Gallagher, 20 Wall. 670; Atchison v. Peterson, 20 Wall, 507; Jennison v. Kirk, 98 U. S. 453.

7 State v. Pottemeyer, 33 Ind. 402; 5 Am. R. 224. And compare Woolen Manuf. Co. v. Smith, 34 Conn. 462; Paine v. Woods, 108 Mass. 160; Myer v. Whitaker, 32 Am. R. 165, note.

8 Higgins v. Kusterer, 41 Mich. 318; 32 Am. R. 160.

§ 5. Crops and trees.—Growing crops planted by the owner of the soil constitute a part of the realty, and a sale of the land simply carries the property of the crop to the purchaser;[1] and this is so, notwithstanding a parol reservation thereof, by the grantor.[2] And one who recovers land in an action of ejectment is entitled to the crops planted after the commencement of that action.[3] But crops planted by a tenant, and growing upon a farm, are, as between the landlord and tenant, personal property, and the tenant has a right to remove them;[4] otherwise, however, if he voluntarily abandon or forfeit possession of the premises.[5] An annual crop planted by the owner of the soil, if mature, and to be gathered immediately, may be sold by him as personalty;[6] and the fact that the crop was still growing, and immature has been held to make no difference.[7] A tree is wholly the property of him upon whose land the trunk stands;[8] and he is entitled to all its fruit, notwithstanding some of its branches overhang the land of another.[9] Growing trees are part and parcel of the land in which they are rooted, and as such are real property.[10] They are an interest in land,[11] and so long as they are annexed to the land, and are neither actually or in contemplation of law severed therefrom, they cannot be sold or transferred by parol.[12] And the same rule is applied to growing fruit or grass, and to all other natural products of the earth which grow

spontaneously without yearly cultivation.[13] A grant by the owner of land of all the trees growing thereon to another and his heirs, with free liberty to cut and carry them away at pleasure, forever, conveys an estate of inheritance in the trees, with a right in the soil necessary for their support and growth, while the fee in the soil itself remains in the grantor.[14]

1 Foote *v.* Colvin, 3 Johns. 222; 3 Am. Dec. 478; Burnside *v.* Weightman, 9 Watts, 47; overruling Smith *v.* Johnson, 1 Penr. & W. 471; 21 Am. Dec. 404; Kittredge *v.* Woods, 3 N. H. 503; and see Webster *v.* Zielly, 52 Barb. 482.

2 Austin *v.* Sawyer, 9 Cowen, 39; Wintermute *v.* Light, 46 Barb. 278. But see Lauchner *v.* Rex, 20 Pa. St. 464; Baker *v.* Jordon, 3 Ohio St. 438. In Ohio, the growing crops do not pass to the purchaser at an execution sale of the land: Houts *v.* Showalter, 12 Ohio St. 124; Cassilly *v.* Rhodes, 12 Ohio, 88. But a different rule prevails in other States: See Bittinger *v.* Baker, 29 Pa. St. 66; Porche *v.* Bodin, 28 La. An. 761; Brittain *v.* McKay, 1 Ired. 265; and compare Howell *v.* Schenck, 24 N. J. L. 89; Sherman *v.* Willett, 42 N. Y. 146; Lane *v.* King, 8 Wend. 584; Crews *v.* Pendleton, 1 Leigh, 297; 19 Am. Dec. 750.

3 McLean *v.* Bovee, 24 Wis. 295; 1 Am. R. 185.

4 Wintermute *v.* Light, 46 Barb. 278; Pfanner *v.* Sturmer, 40 How. Pr. 401; Stewart *v.* Doughty, 9 Johns. 112; Hunt *v.* Watkins, 1 Humph. 498. Compare Ladd *v.* Abel, 18 Conn. 513; Graves *v.* Weld, 5 Barn. & Adol. 105.

5 Debon *v.* Colfax, 5 Halst. 128; Bulwer *v.* Bulwer, 2 B. & A. 470; Hawkins *v.* Skegg, 10 Humph. 31; Gee *v.* Young, 1 Hayw. 17; Whipple *v.* Foote, 2 Johns. 418; Pfanner *v.* Sturmer, 40 How. Pr. 401. Trees and shrubs, in land demised to be used as a nursery garden, are personal chattels, as between the lessor and the lessee and his assigns, and may be severed and removed: Miller *v* Baker, 1 Met. 27; Whitmarsh *v.* Walker, 1 Met. 313; Coombs *v.* Jordon, 3 Bland Ch. 284; 22 Am. Dec. 236.

6 Parker *v.* Stainland, 11 East, 362; Evans *v.* Roberts, 5 Barn. & C. 829.

7 Jones *v.* Flint, 10 Ad. & E. 753; Carrington *v.* Roots, 2 Mees. & W. 248; Austin *v.* Sawyer, 9 Cowen, 42; Craddock *v.* Riddlesburger, 2 Dana, 206. But see Emerson *v.* Heelis, 2 Taunt. 38.

8 Holder *v.* Coates, 1 Moody & M. 112; 22 Eng. C. L. 264; Dubois *v.* Beaver, 25 N. Y. 123; Lyman *v.* Hale, 11 Conn. 177; and see Griffin *v.* Bixby, 12 N. H. 454.

9 Hoffman *v.* Armstrong, 46 Barb. 337; 48 N. Y. 201; 8 Am. R. 537.

10 Jones *v.* Flint, 10 Ad. & E. 753; Green *v.* Amstrong, 1 Denio 550; Bank of Lansingburgh *v.* Crary, 1 Barb. 542; Vorebeck *v.* Roe, 50 Barb. 302.

11 Warren *v.* Leland, 2 Barb. 613; Wright *v.* Barrett, 13 Pick. 44; and see Brackett *v.* Goddard, 54 Me. 309.

12 Warren *v.* Leland, 2 Barb. 613; McGregor *v.* Brown, 10 N. Y. 114. But compare Claflin *v.* Carpenter, 4 Met. 580; Olmstead *v.* Niles, 7 N. H. 522; Smith *v.* Surman, 9 Barn. & C. 561. In New York, a conveyance of growing trees, though not recorded, is valid against a subsequent purchaser without notice: Warren *v.* Leland, 2 Barb. 613. But compare Goodyear *v.* Vosburgh, 39 How. 377.

13 Green *v.* Armstrong, 1 Denio, 550; Bank of Lansingburgh *v.* Crary, 1 Barb. 542; Bennett *v.* Scutt, 18 Barb. 347; Jones *v.* Flint, 10 Ad. & E. 753; Teal *v.* Auty, 2 Brod. & B. 99. See Williamson *v.* Steele, 3 Lea, 527; 31 Am. R. 652; Moore *v.* Byrum, 10 S. C. 452; 30 Am. R. 58; Purner *v.* Piercy, 40 Md. 212; 17 Am. R. 531.

14 Knotts *v.* Hydrick, 12 Rich. 314; Clap *v.* Draper, 4 Mass. 266; 3 Am. Dec. 215; and see White *v.* Foster, 102 Mass. 375; Delaney *v.* Root, 99 Mass. 546.

§ 6. Mines.—Land, in its legal signification, extends downwards as well as upwards, and includes whatever is in a direct line between the surface and the center of the earth, such as mines of metals, coals, and all other fossils, which belong to the owner of the surface.[1] *Prima facie*, such owner is entitled to all the minerals and strata of coal, ore, etc., as a part of the fee and inheritance, and they will all pass by descent, or by conveyance, without special designation.[2] But the owner of the fee may grant all the ores and minerals, and still remain general owner of the land;[3] or he may grant the land, and except and reserve the mines to himself and his heirs.[4] But when so severed, mines are still regarded as real estate, and the general laws regarding real estate will apply to them.[5] They are capable of being held, conveyed, and transmitted by will or inheritance, and of being a separate estate, carved out of the fee.[6] When the owner of the whole fee grants the minerals, reserving the surface, his grantee is entitled only to so much of the minerals as he can get without injury to the surface.[7] The mineral strata must be so occupied and used as not to divest or interfere with a reasonable and proper support of the surface lands.[8] And the surface owner may not impose additional burdens, by artificial structures erected thereon, to be supported by the mine owner.[9] It was said that the term "minerals" in a conveyance of land, reserving all "mines and minerals," etc., is to be taken in its popular signification.[10] But the term was held to include "china clay."[11] And anything except the mere surface, which is used for agricultural purposes, and which is useful for any purpose whatever, whether gravel, marble,

fire-clay, or the like, is held to be included within the word "mineral," when there is a reservation of the mines and minerals from a grant of land.[12] Stones cut from quarries are "minerals," within the meaning of the terms coals or minerals, in an act of Parliament.[13] In England, mines of gold and silver, by the royal prerogative, belong to the crown, though found in the land of an individual proprietor.[14] So the statutes of New York reserve to the State all gold and silver mines, permitting the discoverers of such mines to enjoy their produce for twenty-one years only;[15] and the right is extended to all mines of other metals found in lands of persons not citizens of the United States;[16] and also to all mines of other metals on lands of citizens of the United States, the ore of which contains less than two-thirds in value of copper, tin, iron, or lead.[17] It was formerly held in California that the State was sole owner, by virtue of its sovereignty, of all the gold and silver mines on public lands within its limits, to the exclusion of the United States.[18] But this doctrine has been overruled,[19] and it may be regarded as now settled that the ownership of such mines is incident to the ownership of the soil, and that they do not belong to the government as an incident of sovereignty.[20] They pass by a grant of the land, unless expressly reserved in the grant;[21] and this applies to the case of patentees claiming under the United States, in respect to lands belonging to the United States within the limits of California.[22]

1 2 Blackst. Com. 18; and see Townley v. Gibson, 2 Term Rep. 705; Grey v. Northumberland, 17 Ves. 282; Bourne v. Taylor, 10 East, 205. Petroleum is a species of mineral: Kier v. Peterson, 41 Pa. St. 362.

2 Adams v. Briggs Iron Co. 7 Cush. 361; Caldwell v. Fulton, 31 Pa. St. 475.

3 Adams v. Briggs Iron Co. 7 Cush. 361; Stewart v. Chadwick, 8 Clarke, 463; Green v. Putnam, 8 Cush. 21; Stoughton v. Lee, 1 Taunt. 402; Harris v. Ryding, 5 Mees. & W. 60; Canfield v. Ford, 28 Barb. 336.

4 Adams v. Briggs Iron Co. 7 Cush. 361.

5 Billings v. Taylor, 10 Pick. 460; Neel v. Neel, 19 Pa. St. 324; Dall v. Confidence etc., Min. Co. 3 Nev. 531; Trustees etc. v. Hawes, 6 Bush, 232; Riddle v. Driver, 12 Ala. 590.

6 Adams v. Briggs Iron Co. 7 Cush. 361; Caldwell v. Fulton, 31 Pa. St. 475. See Merritt v. Judd, 14 Cal. 59.

7 Coleman v. Chadwick, 80 Pa. St. 81; Jones v. Wagner, 66 Pa. St. 429; 5 Am. R. 385; Horner v. Watson, 79 Pa. St. 242; 21 Am. R. 55; Marvin v. Brewster Iron Min. Co. 55 N. Y. 538; 14 Am. R. 322; Yandes v. Wright, 66 Ind. 319; 32 Am. R. 109; Wakefield v. Duke of Buccleuch, Law R. 4 Eq. Cas. 613.

8 Ryckman v. Gillis, 57 N. Y. 68; Smart v. Morton, 5 El. & B. 30; Wilms v. Jess, 94 Ill. 464; 34 Am. R. 242.

9 Grubb v. Bayard, 2 Wall. Jr. 81; Humphris v. Brogden, 12 Ad. & E. (N. S.) 73); Zinc Co. v. Franklinite Co. 13 N. J. Eq. 322; Wilkinson v. Proud, 11 Mees. & W. 33. Compare Wilms v. Jess, 94 Ill. 464; 34 Am. R. 242.

10 Gibson v. Tyson, 5 Watts, 34. Compare Dark v. Johnson, 55 Pa. St. 164.

11 Hext v. Gill, Law R. 7 Ch. App. 699; 3 Eng. R. 574.

12 Midland Railw. Co. v. Checkley, Law R. 4 Eq. 19. Compare Allaway v. Wagstaff, 4 Hurl. & N. 307; Rosse v. Wainman, 14 Mees. & W. 859; Emery v. Owings, 6 Gill. 191; Hartwell v. Camman, 2 Stockt. Ch. 128.

13 Micklethwait v. Winter, 5 Eng. L. & Eq. 526.

14 Queen v. Northumberland. 1 Plow. 310, 336; 1 Bl. Com. 294, 295; Lyddel v. Weston, 2 Atk. 19.

15 1 Rev. Stat. 281, §§ 1, 4.

16 1 Rev. Stat. 281, § 1.

17 1 Rev. Stat. 281, § 1; and see 3 Kent Com. 378.

18 Hicks v. Bell, 3 Cal. 219; and see Stoakes v. Barrett, 5 Cal. 36.

19 In Moore v. Smaw, 17 Cal. 199.

20 Ah Hee v. Crippen, 19 Cal. 491. See also United States v. Parrott, 1 McAll. 271; United States v. Castillero, 2 Black, 17; Fremont v. United States, 17 How. 542; Mining Co. v. Boggs, 14 Cal. 279. Under the laws of California, permission is given to all persons to work the mines upon public lands, notwithstanding they may be in the possession and enjoyment of another for agricultural purposes merely: Stoakes v. Barrett, 5 Cal. 36; Rogers v. Soggs, 22 Cal. 444.

21 Moore v. Smaw, 17 Cal. 199. A gold mine is real estate, and can be transferred only by an instrument in writing: Melton v. Lambard, 51 Cal. 258.

22 Moore v. Smaw, 17 Cal. 199; Boggs v. Merced Co. 14 Cal. 375.

§ 7. Houses.—The term "land" legally includes all houses and buildings standing thereon.[1] Such buildings are *prima facie* part of the realty;[2] and if they be erected upon the land of one person by another person, without any authority or agreement in respect thereto, they become a part of the realty, and pass with a conveyance of the land.[3] So, if one man builds a house on his own land with the materials of another, the property in the land vests the property in the building, and the owner of the land would only be obliged to answer to the owner of the materials for the value of them.[4] But buildings erected

by one person upon the land of another with the latter's consent, express or implied, are the property of the former,[5] who may maintain trover for them against the owner of the land.[6]

1 Co. Litt. 4 *a*; 2 Blackst. Com. 17; Coombs *v.* Jordon, 2 Bland Ch. 284; 22 Am. Dec. 236; Sudbury *v.* Jones, 8 Cush. 189. One may have an estate in a single chamber in a dwelling-house: Loring *v.* Bacon, 4 Mass. 576; Doe *v.* Burt, 1 Term Rep. 701; and may maintain ejectment therefor: Otis *v.* Smith, 9 Pick. 293.

2 See Mott *v.* Palmer, 1 N. Y. 564; Ford *v.* Cobb, 20 N. Y. 344; Reid *v.* Kirk, 12 Rich. 54; Huebschmann *v.* McHenry, 29 Wis. 655; Lipsky *v.* Borgmann, 52 Wis. 256; 38 Am. R. 735.

3 Washburn *v.* Sprout, 16 Mass. 449; West *v.* Stewart, 7 Pa. St. 122; Cooper *v.* Adams, 6 Cush. 87; Leland *v.* Gassett, 17 Vt. 403; Ritchmeyer *v.* Morss, 5 Abb. Pr. N. S. 44; 4 Abb. Ct. App. 55; 3 Keyes, 340; Bouney *v.* Foss, 62 Me. 243. The word "house," in the common and ordinary acceptance of the term, and also in its legal signification, embraces everything appurtenant and accessary to the main building: Workman *v.* Ins. Co. 2 La. 507; 22 Am. Dec. 141. See People *v.* Stickman, 34 Cal. 242; State *v.* Garity, 46 N. H. 61; McMillan *v.* Solomon, 42 Ala. 356; Edwards *v.* Derrickson, 28 N. J. L. 39.

4 Peirce *v.* Goddard, 22 Pick. 559; 2 Kent Com. 360. Compare Betts *v.* Lee, 5 Johns. 348.

5 Dame *v.* Dame, 38 N. H. 429; Sudbury *v.* Jones, 8 Cush. 184; Harris *v.* Gillingham, 6 N. H. 9; 23 Am. Dec. 701; Hartwell *v.* Kelly, 117 Mass. 235; Curtis *v.* Hoyt, 19 Conn. 154.

6 Osgood *v.* Howard, 6 Me. 452; 20 Am. Dec. 322. And see Cent. etc. R. R. Co. *v.* Fritz, 20 Kan. 430; 27 Am. Rep. 175. One in possession of land, *bona fide* as his own, may remove buildings therefrom erected by him, without incurring liability to the true owner of the land: Wickliffe *v.* Clay, 1 Dana. 591. Compare Freeman *v.* Headley, 33 N. J. L. 523.

§ 8. Pews in churches.—In England, the right to a pew in a church is a franchise, which can only exist by a faculty granted, or by prescription.[1] The freehold of the church is in the parson for the time being, and the right in a pew is a mere easement for special purposes.[2] In this country, in the absence of any statute provisions regulating this description of property, pews in churches are usually considered as real estate.[3] And the sale of a pew in a church is the sale of an interest in real estate.[4] A pew owner has an exclusive right to occupy his pew, and may maintain an action against a trespasser or any person who infringes upon his rights.[5] But he does not own the soil over which the pew is built, nor the space above it.[6] And the property in a pew is necessarily sub-

ject to the right in the parish, etc., to remove the church building, or to make such alterations therein as the good of the society may require.[7] But if a pew is destroyed for convenience only, or if the trustees have been guilty of a wanton and malicious abuse of their power in destroying it, the owner may recover damages.[8]

1 2 Blackst. Com. 428; Pettman *v.* Bridger, 1 Phill. 316; Jarratt *v.* Steele, 3 Phill. 167; Griffin *v.* Dighson, 5 Best & Smith, 93; Bryan *v.* Whistler, 8 Barn. & C. 288; Crisp *v.* Martin, L. R. 2 Pro. Div. 15; 19 Eng. R. 553.

2 See Pettman *v.* Bridger, 1 Phill. 316; Reynolds *v.* Monkton, 2 Car. & K. 385; Woollcombe *v.* Ouldridge, 3 Add. 1; Daniel *v.* Wood, 1 Pick. 102.

3 Cox *v.* Baker, 17 Mass. 438; Baptist Church *v.* Bigelow, 16 Wend. 28; True *v.* Merrill, 28 Vt. 672; Presbyterian Church *v.* Andruss, 1 N. J. L. 325.

4 Vielie *v.* Osgood, 8 Barb. 130; and see Brumfield *v.* Carson, 33 Ind. 94; 5 Am. R. 184.

5 Woodworth *v.* Payne, 74 N. Y. 196; 30 Am. R. 298; Kellogg *v.* Dickinson, 18 Vt. 266; Howe *v.* Stevens, 47 Vt. 262; Gay *v.* Baker, 17 Mass. 435; 9 Am. Dec. 159.

6 Gay *v.* Baker, 17 Mass. 435; 9 Am. Dec. 159. Pew owners have simply an easement in the freehold: Proprietors, etc. *v.* Rowell, 66 Me. 400.

7 Daniel *v.* Wood, 1 Pick. 102; 11 Am. Dec. 151; Lohier *v.* Trinity etc. 109 Mass. 1; Voorhees *v.* Presby. Church, 8 Barb. 135; Kincaid's Appeal, 66 Pa. St. 411; Solomon *v.* Cong. etc. 49 How. Pr. 263; Kellogg *v.* Dickinson, 18 Vt. 266; White *v.* Trustees etc., 3 Lans. 484. See Craig *v.* First Presby. Church, 88 Pa. St. 42.

8 Voorhees *v.* Presby. Church, 8 Barb. 135; and see Howe *v.* Stevens, 47 Vt. 262.

§ 9. Fixtures.—The law relative to fixtures has its foundation in the principle that certain things personal in their nature, when fitted and prepared to be used with real estate, and necessary for its beneficial use, become a part of the realty;[1] and if on the premises at the time of the conveyance, pass by a deed of such realty.[2] Thus, generally speaking, everything put into and forming part of a building,[3] or machinery for manufacturing purposes,[4] and essential to the manufactory, is part of the freehold.[5] A saw-mill and its appointments are *prima facie* part of the realty, and should be so treated, if no agreement, understanding, or intent is shown to change their character.[6] So the engines, utensils, and imple-

ments, whether fixed or loose, employed in the working of a mine, are deemed a part of the realty.[7] Physical annexation to the realty is not necessary to convert a chattel into a fixture.[8] If the article, whether fast or loose, be indispensable in carrying on the specific business, it becomes a part of the realty.[9] And an article not made expressly for use in the building in which it is placed, but which is capable of beneficial use if removed or set up in some other building, is personalty or realty, according to the intent or understanding fairly deducible from the circumstances.[10] And, in general, the question of fixture depends on the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act.[11] The character of the physical attachment, whether slight or otherwise, and the use, are mainly important in determining the intention of the party making the annexation.[12] The right to retain property as annexed to the soil is strongly construed in favor of the heir of the party making the annexation, as against the executor,[13] and in favor of the vendee, as against the vendor.[14] And the right to remove fixtures is most liberally construed in favor of the tenant, as against the landlord.[15] Whatever a tenant affixes to leased premises may, as a general rule, be removed by him during the term, provided the removal may be made without material injury to the freehold.[16] And it is held that erections made by a tenant are not within a subsequent mortgage of the premises, although he neglects to remove them during the term, and accepts a renewal of the lease from a new landlord.[17] Gas-fixtures in a house, though attached by screws to pipes, are generally held to be mere chattels.[18] But in a suit between a mortgagee of the chattels on certain premises, and a subsequent mortgagee of the realty on which the chattels were situated, the gas-burners were held to be fixtures.[19] Poles used necessarily in cultivating hops, though taken down and

piled on the land, are a part of the real estate, so as to pass with a sale of the land.[20] So of fencing materials on a farm, temporarily detached, without any intent of diverting them from their use as such.[21] And fragments of a building blown down by a tempest pass with a sale of the land.[22] Machinery erected in a mill after the execution of a mortgage, to supply the place of old and worn-out articles, becomes a part of the realty, and subject to the lien of the mortgage.[23] But machinery placed in a mill, under an agreement that the title shall remain in the seller until paid for, does not become a fixture.[24] If one owns unlike interests in the land and in the machinery, the latter is to be considered personal estate.[25] A tenant may, in general, remove articles erected for ornament or domestic use, where the removal will not cause injury to the freehold.[26] And the same rule applies generally to fixtures erected for the purposes of trade.[27] And it was held that stone piers built by a railway company, on lands over which it had acquired the right of way, did not, though firmly imbedded in the earth, become the property of the owner of the lands as part of the reality.[28] And where land is let for a nursery garden, the lessee may remove trees and shrubs planted by him for the purpose of sale.[29] His interest in the land continues until the trees, etc., are fit to be transplanted.[30]

1 Farrar v. Stackpole, 6 Me. 154; 19 Am. Dec. 201; Mather v. Fraser, 2 Kay & J. 536. See Cal. Civ. Code, § 660.

2 Holland v. Hodgson, Law R. 7 C. P. 328; 2 Eng. R. 655; D'Eyncourt v. Gregory, Law. R. 5 Eq. Cas. 382; Stockwell v. Campbell, 30 Conn. 362; 12 Am. R. 393; Green v. Phillips, 26 Gratt. 572; 21 Am. R. 323; Potter v. Cromwell, 40 N. Y. 287.

3 Tabor v. Robinson, 36 Barb. 483; Main v. Schwarzwaelder, 4 Smith, E. D. 273; Richardson v. Borden, 42 Miss. 71; 2 Am. Rep. 595; Noble v. Bosworth, 19 Pick. 314; Farrar v. Stackpole, 6 Me. 154; 19 Am. Dec. 201; Lyde v. Russell, 1 Barn. & Adol. 394. Compare Peck v. Batchelder, 40 Vt. 233.

4 See Voorhis v. Freeman, 2 Watts & S. 116; Jones v. Detroit Chair Co. 38 Mich. 92; 31 Am. Rep. 314; Coleman v. Stearns etc. 38 Mich. 20; Case v. Arnett, 26 N. J. Eq. 450; Pierce v. George, 108 Mass. 78; McLaren v. Coombs, 16 Grant U. C. 537; Grimshaw v. Burnham, 25 U. C. Q. B. 147; Capen v. Peckham, 35 Conn. 88.

6 Brown v. Wood, 35 Ind. 268; Pea v. Pea, 35 Ind. 387; Stanhope v. Supplee, 2 Brewst. 455; Clime v. Wood, Law R. 3 Ex. 256; Law R. 4 Ex. 328.

6 Farrar v. Stackpole, 6 Me. 154; 19 Am. Dec. 201; Robertson v. Corsett, 39 Mich. 377; Fisher v. Dixon, 12 Clark & F. 312.

7 Fisher v. Dixon, 12 Clark & F. 312; Cal. Civ. Code, § 661.

8 Morris' Appeal, 88 Pa. St. 368. Compare Dubois v. Kelly, 10 Barb. 496; Wansbrough v. Maton, 4 Ad. & E. 884; Brown v. Lillie, 6 Nev. 244; Winslow v. Merchants etc. 4 Met. 314.

9 Morris' Appeal, 88 Pa. St. 368; Fisher v. Dixon, 12 Clark & F. 312; Metrop. etc. Soc. v. Brown, 26 Beav. 454; In re Richards, Law R. 4 Ch. 630.

10 Robertson v. Corsett, 39 Mich. 777. Compare Hill v. Wentworth, 28 Vt. 428; Gale v. Ward, 14 Mass. 352; Cresson v. Stout, 17 Johns. 116.

11 Hill v. Sewald, 53 Pa. St. 271; Meigs' Appeal, 62 Pa. St. 28; 1 Am. Rep. 372; and see McRea v. Cent. Nat. Bank, 66 N. Y. 494; State Sav. Bank v. Kerchoval, 65 Mo. 682; 27 Am. Rep. 310; Ottumwa etc. Co. v. Hawley, 44 Iowa, 57; Hutchins v. Masterson, 46 Tex. 551; 26 Am. Rep. 286.

12 Teaff v. Hewitt, 1 Ohio St. 511; Potter v. Cromwell, 40 N. Y. 287; Hutchins v. Masterson, 46 Tex. 551; 26 Am. Rep. 286; Arnold v. Crowder, 81 Ill. 56; 25 Am. Rep. 260; Williamson v. N. J. etc. R. R. Co. 29 N. J. Eq. 311.

13 Fisher v. Dixon, 12 Clark & F. 312; Buckley v. Buckley, 11 Barb. 43.

14 See Keeve v. Paxton, 26 N. J. Eq. 107; Adams v. Beadle, 47 Iowa, 439; 29 Am. Rep. 487; Martin v. Cope, 28 N. Y. 180; Arnold v. Crowder, 81 Ill. 56; 25 Am. Rep. 260. In re Richards, Law R. 4 Ch. 630; Meux v. Jacobs, Law R. 7 H. L. 481; 13 Eng. R. 2; Holland v. Hodgson, Law R. 7 C. P. 328; 2 Eng. R. 655; Longbottom v. Berry, Law R. 5 Q. B. 123; McConnell v. Blood, 123 Mass. 47; 25 Am. Rep. 12.

15 Van Ness v. Packard, 2 Peters, 137; Oves v. Oglesby, 7 Watts, 106; Forbes v. Shattuck, 22 Barb. 558; Burnside v. Marcus, 17 U. C. C. P. 430; O'Donnell v. Hitchcock, 118 Mass. 401; Seeger v. Pettit, 77 Pa. St. 437; 18 Am. Rep. 452; Pennybecker v. McDougal, 48 Cal. 160.

16 Elwes v. Maw, 3 East, 38; Foley v. Addenbrooke, 13 Mees. & W. 197; Gaffield v. Hapgood, 17 Pick. 192; Dubois v. Kelly, 10 Barb. 496; Torrey v. Burnett, 38 N. J. 457; 20 Am. Rep. 421; Stokoe v. Upton, 40 Mich. 581; 29 Am. Rep. 560.

17 Kerr v. Kingsbury, 39 Mich. 150; 33 Am. Rep. 362; and see Davis v. Moss, 38 Pa. St. 346. But compare Loughran v. Ross, 45 N. Y. 792; 6 Am. Rep. 173; Josslyn v. McCabe, 46 Wis. 591.

18 Guthrie v. Jones, 108 Mass. 191; Towne v. Fiske, 127 Mass. 125; 34 Am. Rep. 353; Jarechi v. Philharmonic Soc. 79 Pa. St. 404; 21 Am. Rep. 78; Rogers v. Crow, 30 Mo. 92; Heysham v. Dettre, 89 Pa. St. 506; Montague v. Dent, 10 Rich. 135; Shaw v. Luke, 1 Daly, 487; McKeage v. Ins. Co. 81 N. Y. 38. But the gas-pipes which run through the walls and under the floors of a house are part of the realty: McKeage v. Ins. Co. 81 N. Y. 38.

19 Keeler v. Keeler, 31 N. J. Eq. 191. And see Funk v. Brigaldi, 4 Daly, 359; Jones v. Detroit Chair Co. 38 Mich. 92; 31 Am. Rep. 314. Mirrors, when deemed fixtures: Ward v. Kilpatrick, 85 N. Y. 413; 39 Am. Rep. 674; 37 Am. Rep. 472, note.

20 Bishop v. Bishop, 11 N. Y. 125.

21 Goodrich v. Jones, 2 Hill, 142; and see Martin v. Cope, 28 N. Y. 180.

22 **Rogers** *v.* Gilliger, 30 Pa. St. 185. Compare Meyers *v.* Schemp, 67 Ill. 469; Graham *v.* Wiley, 16 U. C. Q. B. 265; Harris *v.* Malloch, 21 U. C. Q. B. 82.

23 Gardner *v.* Finley, 19 Barb. 317; Snedeker *v.* Warring, 12 N. Y. 170; Johnston *v.* Morrow, 60 Mo. 339; Southworth *v.* Isham, 3 Sand. 448. Compare Pierce *v.* George, 108 Mass. 78; Globe etc. Co. *v.* Quinn, 76 N. Y. 23; 32 Am. Rep. 259; Jones *v.* Detroit Chair Co. 38 Mich. 92; 31 Am. Rep. 314.

24 Sheldon *v.* Anable, 35 N. Y. 279. But compare Taft *v.* Stetson, 117 Mass. 471; Davenport *v.* Shants, 43 Vt. 546.

25 Adams *v.* Lee, 31 Mich. 440; Robertson *v.* Corsett, 39 Mich. 777.

26 See Birch *v.* Dawson, 2 Ad. & E. 37; Seeger *v.* Pettit, 77 Pa. St. 437; 18 Am. Rep. 452.

27 Oves *v.* Oglesby, 7 Watts, 106; Perkins *v.* Swank, 43 Miss. 349; Ford *v.* Cobb, 20 N. Y. 344; Van Ness *v.* Packard, 2 Peters, 137; Holbrook *v.* Chamberlin, 116 Mass. 155; 17 Am. Rep. 146; Torrey *v.* Burnett, 38 N. J. L. 457; 20 Am. Rep. 421. Compare Watriss *v.* First Nat. Bank, 124 Mass. 571; 26 Am. Rep. 694; Turner *v.* Conover, Law. R. 5 Q. B. 306; Hellawell *v.* Eastwood, 6 Ex. 295.

28 Wagner *v.* Cleveland etc. R. R. Co. 22 Ohio St. 563; 10 Am. Rep. 770; and see Coburn *v.* Ames, 52 Cal. 385; 28 Am. Rep. 634.

29 Miller *v.* Baker, 1 Met. 27; Coombs *v.* Jordon, 3 Bland Ch. 284; 22 Am. Dec. 236; and see Panton *v.* Robart, 2 East, 88; Martin *v.* Roe, 40 Eng. L. & Eq. 68; 7 El. & B. 237. Compare Adams *v.* Beadle, 47 Iowa, 439; 29 Am. Rep. 487.

30 King *v.* Wilcomb, 7 Barb. 263. Compare Brooks *v.* Galster, 51 Barb. 196; Ombony *v.* Jones, 19 N. Y. 239, 240.

§ 10. Money treated as realty.—In equity, money is sometimes invested with the incidents and attributes of real estate.[1] Property takes the form into which it is turned by its owner, if such owner be an adult and of sound and disposing mind;[2] hence, in equity, money directed in wills and other instruments to be employed in the purchase of land is considered as land,[3] in accordance with the principle that a court of equity considers things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance.[4]

1 See March *v.* Barrier, 6 Ired. Eq. 524; Bogart *v.* Furman, 10 Paige, 496; Walker *v.* Denne, 2 Ves. Jr. 170; Fletcher *v.* Ashburner, 1 Bro. C. C. 497; Wyman *v.* Wyman, 26 N. Y. 253; Houghton *v.* Hapgood, 13 Pick. 154; In re Miller, 48 Cal. 165; 17 Am. Rep. 422.

2 Horton *v.* McCoy, 47 N. Y. 21; Denham *v.* Cornell, 7 Hun, 662.

3 Biddulph *v.* Biddulph, 12 Ves. 161; Foreman *v.* Foreman, 7 Barb. 215; Trelawney *v.* Booth, 2 Atk. 307; Craig *v.* Leslie, 3 Wheat. 563.

4 Craig *v.* Leslie, 3 Wheat. 563; and see Coman *v.* Lakey, 80 N. Y. 350; Arnold *v.* Gilbert, 5 Barb. 190; Hawley *v.* James, 5 Paige, 318; Rawley *v.* Adams, 7 Beav. 548; Thomas *v.* Wood, 1 Md. Ch. 256; Slocum

v. Slocum, 4 Edw. Ch. 613; Lysaght v. Edwards, Law R. 2 Ch. Div. 499; 17 Eng. R. 534. If one die seized of real estate encumbered by a mortgage, which is thereafter foreclosed and the land sold, any surplus arising on the sale is to be regarded as realty, and goes to the heirs or devisees, and not to an administrator: Dunning v. Ocean Nat. Bank, 61 N. Y. 497; 6 Lans. 296; 19 Am. Rep. 293; and see McCarthy's Estate, 11 Phila. 85. But compare Varnum v. Meserve, 8 Allen, 160.

§ 11. Shares in stocks.—In England, shares in the property of certain corporations have been declared to be real estate;[1] and in some of the earlier American cases, shares in the stock of a corporation were treated as realty.[2] But the doctrine established by the later decisions is, that shares of stock in railway[3] and other corporations are personal property,[4] and as such are in all respects treated.[5]

1 Weekley v. Weekley, 2 Younge & C. 281, note; Buckeridge v. Ingraham, 2 Ves. 652; Drybutter v. Bartholomew, 2 P. Wms. 127. Compare Thornton v. Ellis, 10 Eng. L. & Eq. 85.

2 Meason's Estate, 4 Watts. 341; Price v. Price, 6 Dana, 107; Howe v. Starkweather, 17 Mass. 240; Welles v. Cowles, 2 Conn. 567. Compare Cape Sable Co.'s Case, 2 Bland Ch. 603.

3 See Johns v. Johns, 1 Ohio St. 350; Huntzinger v. Phila. Coal Co. 11 Phila. 609; Ashton v. Langdale, 4 De Gex & S. 402; 4 Eng. L. & Eq. 80.

4 Arnold v. Ruggles, 1 R. I. 165; Griffith v. Watson, 19 Kan. 23; Gilpin v. Howell, 5 Pa. St. 41; Union Bank v. State, 9 Yerg. 490; Isham v. Iron Co. 19 Vt. 230; Edwards v. Hall, 6 De Gex, M. & G. 74; 35 Eng. L. & Eq. 433.

5 Bradley v. Holdsworth, 3 Mees. & W. 422; Tippetts v. Walker, 4 Mass. 595; Pilligh v. Brent, 2 Younge & C. 234; and see Blake v. Jones, 1 Ball. Eq. 141; 21 Am. Dec. 530.

§ 12. Manure, sea-weed, etc.—Manure made in the course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of any express stipulation to the contrary, it passes as appurtenant to the realty.[1] The rule has been held applicable in cases between vendor and vendee,[2] mortgagor and mortgagee,[3] and landlord and tenant;[4] and it rests upon the ground that it is for the interest of good husbandry and the encouragement of agriculture that manure produced on a farm, in the common course of husbandry, shou'd be consumed upon it.[5] But where the manure is made from produce obtained elsewhere, or if the lands are not agri-

cultural, as in the case of livery stables, the reason of the rule fails, and the rule itself does not apply;[6] the manure so made is personal property, and may be removed by the tenant at the close of his term.[7] In New Jersey, manure lying in and around the barn-yard is held to be personal property, and does not pass as a part of the realty.[8] So, in North Carolina, a tenant may, in the absence of a covenant or custom to the contrary, remove all the manure made on a farm by him.[9] Sea-weed which has been thrown upon land by the sea is considered an accretion, and belongs to the owner of the soil.[10] Its usefulness as a manure, and as a protection to the bank, will, upon every just and equitable principle, vest the property of the weed in the owner of the land.[11] And slabs, sawdust, shavings, and other refuse used to fill up low or marshy ground are realty;[12] but slabs and pieces of timber suitable for fire-wood, piled up on land, and intended to be used and removed as fire-wood, are personalty.[13]

1 Kittredge *v.* Woods, 3 N. H. 503; 14 Am. Dec. 393; Fay *v.* Muzzey, 13 Gray, 53; Haslem *v.* Lockwood, 37 Conn. 500; Hill *v.* De Rochemont, 48 N. H. 88. See Strong *v.* Doyle, 110 Mass. 92; Fletcher *v.* Herring, 112 Mass. 382.

2 Goodrich *v.* Jones, 2 Hill, 142; Kittredge *v.* Woods, 3 N. H. 503; 14 Am. Dec. 393.

3 Chase *v.* Wingate, 68 Me. 204; 28 Am. Rep. 36.

4 Daniels *v.* Pond, 21 Pick. 367; Lassell *v.* Reed, 6 Me. 222; Middlebrook *v.* Corwin, 15 Wend. 169, 171.

5 Haslem *v.* Lockwood, 37 Conn. 500; Chase *v.* Wingate, 68 Me. 204; 28 Am. Rep. 36.

6 Carroll *v.* Newton, 17 How. Pr. 189; Corey *v.* Bishop, 48 N. H. 146; Proctor *v.* Gilson, 49 N. H. 62; and see Fobes *v.* Shattuck, 22 Barb. 568.

7 Carrol *v.* Newton, 17 How. Pr. 189; Needham *v.* Allison, 24 N. H. 355; and see Gallagher *v.* Shipley, 24 Md. 418.

8 Ruckman *v.* Outwater, 28 N. J. L. 581. In England, the way-going tenant may by custom claim compensation for the manure made during his occupancy: Roberts *v.* Barker, 1 Cromp. & M. 809.

9 Smithwick *v.* Ellison, 2 Ired. 326; Sanders *v.* Ellington, 77 N. C. 235. Manure which had accumulated in a public street from the droppings of animals was held to be the property of one who added materially to its value by his labor in raking it into heaps: Haslem *v.* Lockwood, 37 Conn. 500; and he was allowed a reasonable time to remove it: Haslem *v.* Lockwood, 37 Conn. 500.

10 Emans *v.* Turnbull, 2 Johns. 313; 3 Am. Dec. 427. Compare Mather *v.* Chapman, 40 Conn. 382; 16 Am. Rep. 46, which holds that sea-weed cast upon the shore between high and low water mark belongs to the public. See also Church *v.* Meeker, 34 Conn. 421.

11 Emans v. Turnbull, 2 Johns. 313; 3 Am. Dec. 427. See Barker v. Bates, 13 Pick. 255.

12 Jenkins v. McCurdy, 48 Wis. 628; 33 Am. Rep. 841.

13 Jenkins v. McCurdy, 48 Wis. 628; 33 Am. Rep. 841; and see Dyer v. Haley, 29 Me. 277.

CHAPTER II.

ESTATE IN FEE-SIMPLE.

§ 13. Definition of estate.
§ 14. Division of estates.
§ 15. Fee-simple.
§ 16. Words necessary to create a fee.
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§ 18. Abeyance of the fee.
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§ 13. Definition of estate.—The word "estate," in its popular and most extensive sense, includes both real and personal property, and is so construed by the courts in interpreting wills.[1] In a more limited sense, the word is used to denote the land itself.[2] But in its appropriate legal signification, it is used to denote the degree, quantity, nature, and extent of interest which a person has in real property.[3] An estate in land is, therefore, the interest which the owner has therein.[4] It is called in Latin *status*, for the reason that it signifies the condition or circumstance in which the owner stands with reference to his property.[5]

1 See Kellogg v. Blair, 6 Met. 322; Bullard v. Goffe, 20 Johns. 252; Kennon v. McRoberts, 1 Wash. 96; 1 Am. Dec. 428; Laing v. Barbour, 119 Mass. 523; Lambert v. Paine, 3 Cranch, 97; Lloyd v. Lloyd, Law R. 7 Eq. Cas. 458; Hawksworth v. Hawksworth, 27 Beav. 1; Doe v. Evans, 9 Ad. & E. 719; O'Toole v. Brown, 3 El. & B. 572.

2 See Lambert v. Paine, 3 Cranch, 97; Van Rensselaer v. Poucher, 5 Denio, 40.

3 Co. Litt. 345; 1 Prest. Est. 7, 20; Walsingham's Case, Plow. 555; Estate of Coleman, 21 N. Y. Daily Reg. No. 63.

4 Co. Litt. 345; 2 Blackst. Com. 103; Van Rensselaer v. Poucher, 5 Denio, 40.

5 2 Blackst. Com. 103. Compare Bridgewater v. Bolton, 6 Mod. 109.

§ 14. Division of estates.—Estates in land are usually considered with reference to their quantity and their quality.[1] The quantity of an estate signifies the time of continuance or degree of interest;[2] and the quality of an estate has reference to the manner of its enjoyment, as whether it be absolutely, solely, in common, in coparcenary, or in joint tenancy.[3] Estates may greatly vary in quantity or duration, and this occasions the primary division of them into such as are freehold, and such as are less than freehold.[4] A freehold is any estate of inheritance or for life in real property;[5] and estates of freehold are divided into those of inheritance and those not of inheritance.[6] Estates less than freehold, as terms for years of land, are called chattel interests or estates;[7] and they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life.[8] If the utmost period of time to which an estate can last is fixed and determined, it is not an estate of freehold, but a mere chattel interest.[9] Freehold estates of inheritance are divided into inheritances absolute or fee-simple, and inheritances limited.[10]

1 See 2 Blackst. Com. 103; 1 Prest. Est. 7, 20; Co. Litt. 345.

2 1 Prest. Est. 21.

3 1 Prest. Est. 21. See chap. 26, *post*.

4 2 Blackst. Com. 103; 2 Crabb, Real Prop. 2; Van Rensselaer *v.* Poucher, 5 Denio, 35, 40.

5 4 Kent Com. 23; 2 Blackst. Com. 104, note; and see Roseboom *v.* Van Vechter, 5 Denio, 414.

6 2 Blackst. Com. 104.

7 2 Blackst. Com. 386; 1 Prest. Est. 203; Ex parte Gay, 5 Mass. 419; Brewster *v.* Hill, 1 N. H. 350; Spangler *v.* Stanler, 1 Md. Ch. 36; and see Prichard *v.* Prichard, Law R. 11 Eq. 232.

8 2 Blackst. Com. 386; and see Prichard *v.* Prichard, Law R. 11 Eq. 232.

9 2 Blackst. Com. 386; and see Chapman *v.* Gray, 15 Mass. 439; Montague *v.* Smith, 13 Mass. 396; Spangler *v.* Stanler, 1 Md. Ch. 36.

10 2 Blackst. Com. 104. Division of estates under the New York Revised Statutes: see 1 Rev. Stats. 722; and see Cal. Civ. Code, § 761, *et seq.*

§ 15. Fee-simple.—A freehold estate of inheritance in fee-simple is the highest and most extensive interest

which a man can have in lands.[1] It is called fee-simple, or *feodum simplex*, because it signifies a lawful and pure inheritance.[2] And the terms "fee-simple" and "fee-simple absolute" have one and the same meaning.[3] The term "fee," when standing by itself, signifies an estate of inheritance;[4] and "simple" is added for the purpose of showing that it is descendible to the heirs generally, without restraint to the heirs of the body, or the like.[5] A fee-simple is, therefore, where lands are given to a man and his heirs forever, generally, absolutely, and simply,[6] without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law.[7] And a man may have a fee-simple in any kind of hereditaments, either corporeal or incorporeal.[8]

1 Co. Litt. 1; 2 Blackst. Com. 105, 106; Van Rensselaer *v.* Poucher, 5 Denio, 35, 40; Cal. Civ. Code, § 762.

2 Co. Litt. 1; Jackson *v.* Van Zandt, 12 Johns. 169.

3 Jackson *v.* Van Zandt, 12 Johns. 169, 177; Clark *v.* Baker, 14 Cal. 631. Compare Lott *v.* Wyckoff, 1 Barb. 565.

4 Co. Litt. 1 *b*; 2 Blackst. Com. 106.

5 Co. Litt. 1 *b*; 1 Prest. Est. 420.

6 2 Blackst. Com. 104. See Patterson *v.* McCousland, 3 Bland Ch. 72; Holliday *v.* Overton, 10 Eng. L. & Eq. 175; Wendell *v.* Crandall, 1 N. Y. 495.

7 2 Blackst. Com. 104.

8 2 Blackst. Com. 106; and compare Canfield *v.* Ford, 28 Barb. 336.

§ 16. Words necessary to create a fee.—At common law, the word "heirs" is essential in the conveyance, in order to create an estate in fee-simple;[1] and no other word or expression is sufficient for the purpose.[2] The rigor of this rule, which is plainly a relic of the feudal strictness,[3] has been greatly relaxed where the estate is created by devise;[4] and if the intention of the testator to pass a fee be clearly expressed, it will be deemed sufficient to have that effect, without the use of the word "heirs."[5] Thus, the word "estate," when used by a testator, and not restrained to a narrower signification by the context of the will, is sufficient to carry the fee.[6] So, in the case of conveyances in trust, without

words of inheritance, the trustee will by implication of law take a fee, if such estate be necessary to fulfill the objects of the trust.[7] A conveyance to a corporation sole, limited to such corporator and his "successors," will pass the fee;[8] but the word "heirs" in a grant to such corporation will only give a life estate.[9] A grant to a corporation aggregate will, from the nature of such corporations, carry the fee, without the use of "successors" or any other words of limitation.[10] And legislative grants may convey land without the use of the technical terms usual in a conveyance.[11] Words of direct reference to some other estate have been held sufficient to pass a fee, without the use of the technical word "heirs";[12] as where the grantee in fee reconveyed the lands "as fully as they were granted to him," and referred to the former deed, this was held to convey a fee.[13] But a life estate without words of inheritance will not be enlarged into a fee by a reference to a will which creates a fee without words of inheritance.[14] In many, perhaps in most, of the States, the rule requiring the use of the word "heirs" in creating an estate in fee by grant has been abrogated by statute;[15] and it is generally provided that every grant shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of the grant.[16] Unless changed by statute, the rule still prevails in all its strictness.[17]

1 Co. Litt. 8 *b*; 2 Prest. Est. 11, 12; Jackson *v.* Meyers, 3 Johns. 388; Gray *v.* Packer, 4 Watts & S. 17.

2 Clearwater *v.* Rose, 1 Blackf. 137; Hollingsworth *v.* McDonald, 2 Har. & J. 230; 3 Am. Dec. 545; Buffum *v.* Hutchinson, 1 Allen, 58; Patterson *v.* Moore, 15 Ark. 222; Bridgewater *v.* Bolton, 6 Mod. 109. In Vermont, a conveyance to a man, his heirs and assigns, as long as "wood grows and water runs," creates a fee-simple: Arms *v.* Burt, 1 Vt. 303; 13 Am. Dec. 680; and see Propagation Soc. *v.* Sharon, 28 Vt. 603. In Kentucky, the words "and bodily heirs" were held to create a fee: True *v.* Nicholls, 2 Duval, 547. But a grant "to J. M. and his generation, to endure so long as the waters of the Delaware run," was held to be a life estate only: Foster *v.* Joice, 3 Wash. C. C. 428.

3 See 2 Blackst. Com. 56, 107.

4 Webb *v.* Herring, 1 Rolle, 399; Goodtitle *v.* Otway, 2 Wils. 7; Jackson *v.* Housell, 17 Johns. 281; Newkirk *v.* Newkirk, 2 Caines, 345.

5 Mayo *v.* Carrington, 4 Call, 472; 2 Am. Dec. 580; Sargent *v.* Towne, 10 Mass. 309; Myers *v.* Myers, 2 McCord Ch. 214; 16 Am. Dec. 648; Merritt *v.* Abendroth, 14 Hun, 216; Wood *v.* Hills, 19 Pa. St. 513.

6 Mably *v.* Stainback, 1 Mart. (N. C.) 75; 1 Am. Dec. 545; Turbett *v.* Turbett, 3 Yeates, 187; 2 Am. Dec. 369; Jackson *v.* Merrill, 6 Johns. 185; 5 Am. Dec. 213; Jackson *v.* Delancy, 13 Johns. 535; 7 Am. Dec. 404; Doe *v.* Hurrell, 5 Barn. & Ald. 21; Lloyd *v.* Lloyd, Law R. 7 Eq. Cas. 458; Nichols *v.* Butcher, 18 Ves. 195; Roe *v.* Wright, 7 East, 263. See § 13, *ante*.

7 Neilson *v.* Lagon, 12 How. 98; Welch *v.* Allen, 21 Wend. 147; White *v.* Woodberry, 9 Pick. 136; North *v.* Philbrook, 34 Me. 532; Showman *v.* Miller, 6 Md. 479; and see Godfrey *v.* Humphrey, 18 Pick. 537.

8 Overseers etc. *v.* Sears, 22 Pick. 126; and see Justices etc. *v.* Thomason, 11 Mon. B. 235; Cong. etc. Soc. *v.* Stark, 34 Vt. 243.

9 Overseers etc. *v.* Sears, 22 Pick. 126.

10 Wilcox *v.* Wheeler, 47 N. H. 488; Boone Corp. § 54. And see People *v.* Mauran, 5 Denio, 389.

11 Rutherford *v.* Greene, 2 Wheat. 196. See also Proprietors etc. *v.* Permit, 5 N. H. 280; 20 Am. Dec. 580; Ward *v.* Bartholomew, 6 Pick. 409.

12 2 Prest. Est. 2; and see Wickersham *v.* Bills, 8 Ind. 287.

13 Wickersham *v.* Bills, 8 Ind. 287.

14 Lytle *v.* Lytle, 10 Watts, 259.

15 See, as to New York: 1 Rev. Stats. 748, § 1; Nicoll *v.* New York etc. R. R. Co. 12 N. Y. 121.

16 See Nicoll *v.* New York etc. R. R. Co. 12 N. Y. 121; Cromwell *v.* Winchester, 2 Head, 389.

17 Hogan *v.* Welcker, 14 Mo. 177.

§ 17. Incidents to estate in fee.—The law has annexed to every estate in fee-simple certain inseparable incidents, one of the most important of which is the power of alienation.[1] And it is a well-established rule, that a condition annexed to the creation of an estate in fee-simple against alienation generally is absolutely void.[2] A fee-simple estate and a restraint upon its alienation cannot in their nature co-exist.[3] A condition that the grantee shall not alien, or that he shall pay a sum of money to the grantor upon alienation, is therefore void, on the ground that it is repugnant to the estate granted;[4] and on the same ground, a condition requiring a devisee to pay a sum of money upon aliening the estate was held to be void;[5] so of a restriction upon a devisee in fee, that he should not dispose of the estate during a period named;[6]

or until his oldest son should become of age.[7] There are, however, cases where partial restrictions upon the power of alienation, such as conditions not to sell to a particular person, or for a particular time, have been held good;[8] but doubts have been expressed as to their correctness.[9] Conditions in the conveyance not repugnant to the estate granted, but restricting the use of the property in some directions, are held to be valid;[10] such, for instance, as a condition that the grantee shall not use or suffer the premises to be used for the manufacture or sale of any intoxicating liquors thereon;[11] or a covenant not to erect a distillery;[12] or restrictions as to the manner of building;[13] or a condition that a school-house should not be erected on the premises, or a blast-furnace, or a livery stable, or a machine shop for iron manufacture, or a powder magazine, or a hospital, or a cemetery.[14] But a condition which avoids a grant on account of the sale of a single glass of intoxicating liquor is unreasonable and absurd, and therefore void.[15] Other inseparable incidents of a fee-simple estate are the rights of descent, of courtesy, and of dower, which will be fully considered in separate chapters.[16] This estate is also liable, both in England and in this country, to the debts of the owner, and as well after as before his death.[17] In this country, whether the lands descend to the heir or go to the devisee, they are subject to the payment of the debts of the ancestor, according to the laws of the State in which they are situated.[18] By the common law of England, estates in fee-simple are forfeited to the crown by attainder of treason,[19] to be forever vested in the crown.[20] But no attainder of treason against the United States shall work corruption of blood or forfeiture, except during the life of the person attainted.[21]

1 Co. Litt. 223 *a*; and see Blackstone Bank *v.* Davis, 21 Pick. 42; Craig *v.* Watt, 1 Watts, 498.

2 Hall *v.* Tufts, 18 Pick. 455; M'Williams *v.* Nisley, 2 Serg. & R. 513; 7 Am. Dec. 654; Blackstone Bank *v.* Davis, 21 Pick. 42; McCleary *v.* Ellis, 54 Iowa, 311; 37 Am. Rep. 205; Walker *v.* Vincent, 19 Pa. St. 369.

6 **Brown** *v.* Wood, 35 Ind. 268; Pea *v.* Pea, 35 Ind. 387; **Stanhope** *v.* Supplee, 2 Brewst. 455; Climo *v.* Wood, Law R. 3 Ex. 256; Law R. 4 Ex. 328.

6 **Farrar** *v.* Stackpole, 6 Me. 154; 19 Am. Dec. 201; **Robertson** *v.* Corsett, 39 Mich. 377; Fisher *v.* Dixon, 12 Clark & F. 312.

7 Fisher *v.* Dixon, 12 Clark & F. 312; Cal. Civ. Code. § 661.

8 Morris' Appeal, 88 Pa. St. 368. Compare Dubois *v.* Kelly, 10 Barb. 496; Wansbrough *v.* Maton, 4 Ad. & E. 884; Brown *v.* Lillie, 6 Nev. 244; Winslow *v.* Merchants etc. 4 Met. 314.

9 Morris' Appeal, 88 Pa. St. 368; Fisher *v.* Dixon, 12 Clark & F. 312; Metrop. etc. Soc. *v.* Brown, 26 Beav. 454; In re Richards, Law R. 4 Ch. 630.

10 **Robertson** *v.* Corsett, 39 Mich. 777. Compare Hill *v.* Wentworth, 28 Vt. 428; Gale *v.* Ward, 14 Mass. 352; Cresson *v.* Stout, 17 Johns. 116.

11 Hill *v.* Sewald, 53 Pa. St. 271; Meigs' Appeal, 62 Pa. St. 28; 1 Am. Rep. 372; and see McRea *v.* Cent. Nat. Bank, 66 N. Y. 494; State Sav. Bank *v.* Kerchoval, 65 Mo. 682; 27 Am. Rep. 310; Ottumwa etc. Co. *v.* Hawley, 44 Iowa, 57; Hutchins *v.* Masterson, 46 Tex. 551; 26 Am. Rep. 286.

12 **Teaff** *v.* Hewitt, 1 Ohio St. 511; Potter *v.* Cromwell, 40 N. Y. 287; Hutchins *v.* Masterson, 46 Tex. 551; 26 Am. Rep. 286; Arnold *v.* Crowder, 81 Ill. 56; 25 Am. Rep. 260; Williamson *v.* N. J. etc. R. R. Co. 29 N. J. Eq. 311.

13 Fisher *v.* Dixon, 12 Clark & F. 312; **Buckley** *v.* Buckley, 11 Barb. 43.

14 See **Keeve** *v.* Paxton, 26 N. J. Eq. 107; **Adams** *v.* Beadle, 47 Iowa, 439; 29 Am. Rep. 487; Martin *v.* Cope, 28 N. Y. 180; Arnold *v.* Crowder, 81 Ill. 56; 25 Am. Rep. 260. In re Richards, Law R. 4 Ch. 630; **Meux** *v.* Jacobs, Law R. 7 H. L. 481; 13 Eng. R. 2; Holland *v.* Hodgson, Law R. 7 C. P. 328; 2 Eng. R. 655; Longbottom *v.* Berry, Law R. 5 Q. B. 123; McConnell *v.* Blood, 123 Mass. 47; 25 Am. Rep. 12.

15 Van Ness *v.* Packard, 2 Peters, 137; Oves *v.* Oglesby, 7 Watts, 106; Forbes *v.* Shattuck, 22 Barb. 558; Burnside *v.* Marcus, 17 U. C. C. P. 430; O'Donnell *v.* Hitchcock, 118 Mass. 401; Seeger *v.* Pettit, 77 Pa. St. 437; 18 Am. Rep. 452; Pennybecker *v.* McDougal, 48 Cal. 160.

16 **Elwes** *v.* Maw, 3 East, 38; Foley *v.* Addenbrooke, 13 Mees. & W. 197; Gaffield *v.* Hapgood, 17 Pick. 192; Dubois *v.* Kelly, 10 Barb. 496; Torrey *v.* Burnett, 38 N. J. 457; 20 Am. Rep. 421; Stokoe *v.* Upton, 40 Mich. 581; 29 Am. Rep. 560.

17 **Kerr** *v.* Kingsbury, 39 Mich. 150; 33 Am. Rep. 362; and see **Davis** *v.* Moss, 38 Pa. St. 346. But compare Loughran *v.* Ross, 45 N. Y. 792; 6 Am. Rep. 173; Josslyn *v.* McCabe, 40 Wis. 591.

18 Guthrie *v.* Jones, 108 Mass. 191; Towne *v.* Fiske, 127 Mass. 125; 34 Am. Rep. 353; Jarechi *v.* Philharmonic Soc. 79 Pa. St. 404; 21 Am. Rep. 78; Rogers *v.* Crow, 30 Mo. 92; Heysham *v.* Dettre, 89 Pa. St. 506; Montague *v.* Dent, 10 Rich. 135; Shaw *v.* Luke, 1 Daly, 487; McKeage *v.* Ins. Co. 81 N. Y. 38. But the gas-pipes which run through the walls and under the floors of a house are part of the realty: McKeage *v.* Ins. Co. 81 N. Y. 38.

19 **Keeler** *v.* Keeler, 31 N. J. Eq. 191. And see **Funk** *v.* Brigaldi, 4 Daly, 359; Jones *v.* Detroit Chair Co. 38 Mich. 92; 31 Am. Rep. 314. Mirrors, when deemed fixtures: Ward *v.* Kilpatrick, 85 N. Y. 413; 39 Am. Rep. 674; 37 Am. Rep. 472, note.

20 **Bishop** *v.* Bishop, 11 N. Y. 125.

21 **Goodrich** *v.* Jones, 2 Hill, 142; and see **Martin** *v.* Cope, 28 N. Y. 180.

22 Rogers *v.* Gilliger, 30 Pa. St. 185. Compare Meyers *v.* Schemp, 67 Ill. 469; Graham *v.* Wiley, 16 U. C. Q. B. 265; Harris *v.* Malloch, 21 U. C. Q. B. 82.

23 Gardner *v.* Finley, 19 Barb. 317; Snedeker *v.* Warring, 12 N. Y. 170; Johnston *v.* Morrow, 60 Mo. 339; Southworth *v.* Isham, 3 Sand. 449. Compare Pierce *v.* George, 108 Mass. 78; Globe etc. Co. *v.* Quinn, 76 N. Y. 23; 32 Am. Rep. 259; Jones *v.* Detroit Chair Co. 38 Mich. 92; 31 Am. Rep. 314.

24 Sheldon *v.* Anable, 35 N. Y. 279. But compare Taft *v.* Stetson, 117 Mass. 471; Davenport *v.* Shants, 43 Vt. 546.

25 Adams *v.* Lee, 31 Mich. 440; Robertson *v.* Corsett, 39 Mich. 777.

26 See Birch *v.* Dawson, 2 Ad. & E. 37; Seeger *v.* Pettit, 77 Pa. St. 437; 18 Am. Rep. 452.

27 Oves *v.* Oglesby, 7 Watts, 106; Perkins *v.* Swank, 43 Miss. 349; Ford *v.* Cobb, 20 N. Y. 344; Van Ness *v.* Packard, 2 Peters, 137; Holbrook *v.* Chamberlin, 116 Mass. 155; 17 Am. Rep. 146; Torrey *v.* Burnett, 38 N. J. L. 457; 20 Am. Rep. 421. Compare Watriss *v.* First Nat. Bank, 124 Mass. 571; 26 Am. Rep. 694; Turner *v.* Conover, Law. R. 5 Q. B. 306; Hellawell *v.* Eastwood, 6 Ex. 295.

28 Wagner *v.* Cleveland etc. R. R. Co. 22 Ohio St. 563; 10 Am. Rep. 770; and see Coburn *v.* Ames, 52 Cal. 385; 28 Am. Rep. 634.

29 Miller *v.* Baker, 1 Met. 27; Coombs *v.* Jordon, 3 Bland Ch. 284; 22 Am. Dec. 236; and see Panton *v.* Robart, 2 East, 88; Martin *v.* Roe, 40 Eng. L. & Eq. 68; 7 El. & B. 237. Compare Adams *v.* Beadle, 47 Iowa, 439; 29 Am. Rep. 487.

30 King *v.* Wilcomb, 7 Barb. 263. Compare Brooks *v.* Galster, 51 Barb. 196; Ombony *v.* Jones, 19 N. Y. 239, 240.

§ 10. Money treated as realty.—In equity, money is sometimes invested with the incidents and attributes of real estate.[1] Property takes the form into which it is turned by its owner, if such owner be an adult and of sound and disposing mind;[2] hence, in equity, money directed in wills and other instruments to be employed in the purchase of land is considered as land,[3] in accordance with the principle that a court of equity considers things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance.[4]

1 See March *v.* Barrier, 6 Ired. Eq. 524; Bogart *v.* Furman, 10 Paige, 496; Walker *v.* Denne, 2 Ves. Jr. 170; Fletcher *v.* Ashburner, 1 Bro. C. C. 497; Wyman *v.* Wyman, 26 N. Y. 253; Houghton *v.* Hapgood, 13 Pick. 154; In re Miller, 48 Cal. 165; 17 Am. Rep. 422.

2 Horton *v.* McCoy, 47 N. Y. 21; Denham *v.* Cornell, 7 Hun, 662.

3 Biddulph *v.* Biddulph, 12 Ves. 161; Foreman *v.* Foreman, 7 Barb. 215; Trelawney *v.* Booth, 2 Atk. 307; Craig *v.* Leslie, 3 Wheat. 563.

4 Craig *v.* Leslie, 3 Wheat. 563; and see Coman *v.* Lakey, 80 N. Y. 350; Arnold *v.* Gilbert, 5 Barb. 100; Hawley *v.* James, 5 Paige, 318; Rawley *v.* Adams, 7 Beav. 548; Thomas *v.* Wood, 1 Md. Ch. 296; Slocum

same against all the world but the State.[4] And an inquest of "office found"[5] is absolutely necessary before he can be divested of it by the State.[6] But an alien cannot take an estate by the act of the law, as by descent, for he has no inheritable blood;[7] and in case the heir is an alien, the title *eo instanti*, and without the necessity of any inquest or other proceedings in the nature of "office found," vests in the State.[8] In this country, the disability of alienage has been removed to a great extent by statute in the different States;[9] but in a few of them the common law still prevails.[10] As it respects corporations, they have the right at common law to take, hold, and dispose of real property, for any purposes not inconsistent with the object of their creation;[11] and they may take by all the usual modes of acquiring property.[12]

1 Co. Litt. 2; 1 Blackst. Com. 466; Parker *v.* Stuckert, 2 Miles, 278; Hileman *v.* Bonslaugh, 13 Pa. St. 344; Huss *v.* Stephens, 52 Pa. St. 282; Bancroft *v.* Consen, 13 Allen, 50; Harmon *v.* James, 7 Smedes & M. 111.

2 See Fox *v.* Southack, 12 Mass. 143; Montgomery *v.* Dovion, 7 N. H. 475; Apthorp *v.* Backus, Kirby, 407; 1 Am. Dec. 26.

3 Co. Litt. 2; Wadsworth *v.* Wadsworth, 12 N. Y. 376; Fairfax *v.* Hunter, 7 Cranch, 619; Gouverneur *v.* Robertson, 11 Wheat. 332

4 Goodrich *v.* Russell, 42 N. Y. 177.

5 See 3 Blackst. Com. 258; Mooers *v.* White, 6 Johns. Ch. 365; Vermont *v.* Boston etc. R. R. Co. 25 Vt. 433.

6 Jackson *v.* Adams, 7 Wend. 368; Elmondorff *v.* Carmichael, 3 Litt. 472; 14 Am. Dec. 86; Goodrich *v.* Russell, 42 N. Y. 177. But upon the death of the alien purchaser, the title of the State is at once perfect by escheat, without any proceedings whatever: 42 N. Y. 177; Crane *v.* Reeder, 21 Mich. 24; 4 Am. Rep. 430.

7 Mooers *v.* White, 6 Johns. Ch. 365; Jackson *v.* Fitzsimmons, 10 Wend. 9; 24 Am. Dec. 198; Munro *v.* Merchant, 28 N. Y. 9, 15; Orr *v.* Hodgson, 4 Wheat. 453; Elmondorff *v.* Carmichael, 3 Litt. 472; 14 Am. Dec. 86.

8 Elmondorff *v.* Carmichael, 3 Litt. 472; 14 Am. Dec. 86; Sands *v.* Lynham, 27 Gratt. 291; 21 Am. Rep. 348; Crane *v.* Reeder, 21 Mich. 24; 4 Am. Rep. 430; and see Hinkle *v.* Shadden, 2 Swan, 46; White *v.* White, 2 Met. (Ky.) 185; Johnson *v.* Hart, 3 Johns. Cas. 322.

9 Under the New York Statute, the children of a resident alien deceased succeed to his real estate, as heirs, although they are themselves non-resident aliens: Goodrich *v.* Russell, 42 N. Y. 177; so, in Kentucky, Eustache *v.* Roadaquest, 11 Bush, 42. And in the former State, an alien female who intermarries with a citizen thereby becomes a citizen capable of taking and holding lands by purchase or descent: Luhrs *v.* Elmer, 80 N. Y. 171. Non-resident aliens may take land by descent under the Massachusetts statutes: Lumb *v.* Jenkins, 100 Mass. 527. See Cal. Civ. Code, § 671.

10 See Crane *v.* Reeder, 21 Mich. 24; 4 Am. Rep. 430; Sands *v.* Lynham, 27 Gratt. 291; 21 Am. Rep. 348.

11 Ketchum *v.* Buffalo, 14 N. Y. 356; Sutton *v.* Cole, 3 Mass. 239; Warden etc. *v.* South East Railw. Co. 9 Hare, 489; 13 Eng. L. & Eq. 240; Boone Corp. § 40.

12 Robie *v.* Sedgwick, 35 Barb. 319.

§ 20. Nature of seizin.—The term "seizin" is applied to the possession of an estate of freehold;[1] and the owner of such an estate is said to be "seized" thereof.[2] Anciently, the term was used to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass.[3] The ceremony of livery of seizin was necessary to vest a title.[4] But the common-law conveyance by feoffment, livery, etc., was never adopted in this country;[5] or if so, it is now out of use, being wholly superseded by deed acknowledged and recorded.[6] A conveyance by deed, duly acknowledged and recorded, is equivalent to livery of seizin.[7] It gives to the grantee legal investiture of the land conveyed, and has the same effect as if the grantor entered upon the land and gave actual seizin by the formal delivery of turf or twig.[8] Actual entry upon the land by an heir or grantee is not in general necessary in order to give him a seizin in deed, provided the ancestor or grantor was seized at the time, or the possession was vacant, the ancestor or grantor having the right.[9] The legal presumption is, that seizin follows the title, and that they correspond with each other.[10] In the absence of other evidence, the deed itself raises a presumption that the grantor had sufficient seizin to enable him to convey, and also operates to vest the legal seizin in the grantee.[11]

1 Co. Litt. 153 *a*; Slater *v.* Rawson, 6 Met. 439; Towle *v.* Ayer, 8 N. H. 58; Van Rensselaer *v.* Poucher, 5 Denio, 35; Durando *v.* Durando, 32 Barb. 529; Bearce *v.* Jackson, 4 Mass. 408. According to the modern authorities, there seems to be no legal difference between the words seizin and possession: Slater *v.* Rawson, 6 Met. 439, 444. Seizin is a *nomen generalissemum*, and means "*ex vi termini*," the whole legal title: Fitzhugh *v.* Croghan, 2 Marsh. J. J. 429; 19 Am. Dec. 139. As generally understood, seizin is of two kinds: seizin in fact or in deed, and seizin in law: Co. Litt. 293 *a*; Hovenden *v.* Annesley, 2 Schoales & L. 624. The former is the actual possession of a freehold, the latter is the right to the possession: Vandorheyden *v.* Crandell. 2 Denio, 9, 21;

1 N. Y. 491; Durando *v.* Durando, 32 Barb. 529. Compare Cook *v.* Hammond, 4 Mass. 458; Matthews *v.* Ward, 10 Gill & J. 443; Bush *v.* Bradley, 4 Day, 365; Jenkins *v.* Fahey, 73 N. Y. 362.

2 See Wells *v.* Prince, 4 Mass. 68; Warren *v.* Childs, 11 Mass. 225; Barr *v.* Gratz, 4 Wheat. 213; Fitzhugh *v.* Croghan, 2 Marsh. J. J. 429; 19 Am. Dec. 130; Englishbe *v.* Helmuth, 3 N. Y. 294.

3 Co. Litt. 266 *b*; 2 Blackst. Com. 209; Taylor *v.* Horde, 1 Burr. 107; and see Pritts *v.* Richey, 29 Pa. St. 71.

4 See 2 Blackst. Com. 315, 316. Livery of seizin is no longer necessary: Stats. 8 and 9 Vict. c. 106, § 2.

5 See 4 Kent Com. 84; Bryan *v.* Bradley, 16 Conn. 480; Davis *v.* Mason, 1 Peters, 504.

6 Higbee *v.* Rice, 5 Mass. 352; Pidge *v.* Tyler, 4 Mass. 541.

7 Higbee *v.* Rice, 5 Mass. 352; and see Bradstreet *v.* Clarke, 12 Wend. 601, 677.

8 Goodwin *v.* Hubbard, 15 Mass. 214; Ward *v.* Fuller, 15 Pick. 185; McKee *v.* Pfout, 3 Dall. 489.

9 Jackson *v.* Howe, 14 Johns. 406; Green *v.* Chelsea, 24 Pick. 71; Green *v.* Liter, 8 Cranch, 229; 1 Greenl. Cruise, *50, note. Compare Jackson *v.* Woodman, 20 Mc. 266; Hinman *v.* Cevanway, 9 Pa. St. 40.

10 Barr *v.* Gratz, 4 Wheat. 213; Ward *v.* Fuller, 15 Pick. 185; and see Farwell *v.* Rogers, 99 Mass. 33.

11 Ward *v.* Fuller, 15 Pick. 185.

§ 21. Disseizin.—By the term "disseizin," according to its primitive and genuine meaning, is to be understood an entry into the lands or tenements of another, accompanied with expulsion, or ouster, of such other from the freehold.[1] Disseizin is an estate gained by wrong and injury, therein differing from dispossession, which may be by right or wrong.[2] But a disseizor is said to be a dispossessor by wrong, claiming a fee, or a title which is equivalent to a fee.[3] The elements of actual disseizin are the fact of entering, and the intention to usurp possession.[4] Disseizin is always a tortious act;[5] yet one may become a disseizor, though entering peaceably under a void deed,[6] or by fraud;[7] and the intention to disseize may, under some circumstances, be imputed to those who by a general rule of law are in ordinary cases incapable of willing, or are not bound by an exercise of the will.[8] An infant or a *feme covert* may be a disseizor.[9] But to constitute actual disseizin there must be an unequivocal act of ownership, open, known, exclusive, adverse, and uninterrupted.[10] Disseizin, like trespass, is a tortious

act adverse in its nature, and in derogation of the right of the true owner.[11] And its effect is to give the disseizor an absolute title in fee, if he be suffered to remain in undisturbed possession of the land during the period prescribed by the Statutes of Limitation.[12] There is, however, a disseizin by election of the owner, or by construction of law, which is recognized in opposition to actual disseizin;[13] not necessarily amounting to an ouster of the freehold, but which the owner may elect to treat as a usurpation of his freehold, in order to vindicate his title by an action at law.[14]

1 Smith *v.* Burtis, 6 Johns. 197; Co. Litt. 181 *a*, 257; Jackson *v* Rogers, 1 Johns. Cas. 33; Towle *v.* Ayer, 8 N. H. 60; Clarke *v.* McClure, 10 Gratt. 305; Ewing *v.* Burnet, 11 Peters, 41; People *v.* Van Rensselaer, 8 Barb. 189, 194; Williams *v.* Thomas, 12 East, 141.

2 Co. Litt. 153; Matheson *v.* Trot, 1 Leon. 209; Slater *v.* Rawson, 6 Met. 439; Doe *v.* Thompson, 5 Cowen, 371.

3 See Smith *v.* Burtis, 6 Johns. 197; M'Call *v.* Neely, 3 Watts, 71; Bigelow *v.* James, 10 Pick. 161.

4 Smith *v.* Burtis, 6 Johns. 197; Wiggins *v.* Holley, 11 Ind. 2; Magee *v.* Magee, 37 Miss. 152; Grant *v.* Fowler, 39 N. H. 101. See Varick *v.* Jackson, 2 Wend. 166; 19 Am. Rep. 571; McGregor *v.* Comstock, 17 N. Y. 172.

5 Doe *v.* Thompson, 5 Cowen, 371; Bradstreet *v.* Huntington, 5 Peters, 401, 438.

6 See Bradstreet *v.* Huntington, 5 Peters, 401; Whitney *v.* French, 25 Vt. 663; Allyn *v.* Mather, 9 Conn. 114; Beverly *v.* Burke, 9 Ga. 440; Thomas *v.* Kelly, 13 Ired. 269; Small *v.* Proctor, 15 Mass. 495.

7 Bradstreet *v.* Huntington, 5 Peters, 401.

8 Bradstreet *v.* Huntington, 5 Peters, 401.

9 1 Rolle Abr. 653; Bradstreet *v.* Huntington, 5 Peters, 401.

10 Taylor *v.* Horde, 1 Burr. 110; Slater *v.* Jopherson, 6 Cush. 129; Johnson *v.* Bean, 119 Mass. 271; Jackson *v.* Schoonmaker, 2 Johns. 230; French *v.* Pearce, 8 Conn. 440; Clarke *v.* McClure, 10 Gratt. 305; Lane *v.* Gould, 10 Barb. 254; Coburn *v.* Hollis, 3 Met. 125; Winthrop *v.* Benson, 31 Me. 381; Jones *v.* Chiles, 2 Dana, 25; Calhoun *v.* Cook, 9 Pa. St. 226; Little *v.* Libby, 2 Me. 242; 11 Am. Dec. 63.

11 Cook *v.* Babcock, 11 Cush. 206; and see Chadbourne *v.* Swan, 40 Me. 260; Winthrop *v.* Benson, 31 Me. 381.

12 Wheeler *v.* Bates, 21 N. H. 460; Denham *v.* Holeman, 26 Ga. 191; Little *v.* Downing, 37 N. H. 367; Groft *v.* Weakland, 34 Pa. St. 308.

13 See Taylor *v.* Horde, 1 Burr. 110; Smith *v.* Burtis, 6 Johns. 197, 215; Prescott *v.* Nevers, 4 Mason, 326.

14 Jerritt *v.* Weare, 3 Price, 575; Miller *v.* Sheckleford, 3 Dana, 389; Smith *v.* Burtis, 6 Johns. 197.

§ 22. American tenures.—Tenure is the mode by which a man holds an estate in lands.[1] Prior to the intro-

duction of the feudal system into England, lands were allodial; that is, they were held in free and absolute ownership, the same as personal property was held.[2] But in consequence of the introduction of the feudal tenures by the Normans, it became a maxim of the English law, that all real property is, in theory, vested in the king, as the head and sovereign representative of the nation;[3] and that all lands in the kingdom are held, either mediately or immediately of the crown, in consideration of certain services to be rendered by the tenant.[4] In the United States, lands are held unencumbered by any feudal burden;[5] nevertheless, in theory at least, all valid individual title to land is to be traced to a grant from the crown,[6] or a State government, or from the government of the United States.[7] So every man holds his estate subject to the right of *eminent domain;*[8] and it is also held under the tacit understanding that the owner shall so deal with his land as not to cause injury to others.[9] The tenant or owner in fee is, however, to all intents and purposes, absolute owner;[10] and it may be said, generally, that lands in this country are held by an allodial title.[11] The principle of discovery was the original foundation of titles to land on the American continent, as between the different European nations, by whom conquests and settlements were here made.[12] Those nations asserted the exclusive right of granting the soil to individuals, subject only to the Indian right of occupancy;[13] and this principle was adopted by the United States.[14] It follows that the Indian title is subordinate to the absolute ultimate title of the Government;[15] and the Indian inhabitants are to be deemed incapable of transferring the absolute title to others.[16]

1 2 Bouv. Dict. 585. See 2 Blackst. Com. 45, 105.

2 2 Blackst. Com. 47; 3 Kent Com. 494.

3 Co. Litt. 1 *b*; 1 Greenl. Cruise, *19.

4 2 Blackst. Com. 105; Commonw. *v.* Alger, 7 Cush. 53, 90.

5 See Cornell *v.* Lamb, 2 Cowen, 652; Bradley *v.* Dwight, 62 How. Pr. 300; Lorman *v.* Benson, 8 Mich. 18; Morgan *v.* King, 30 Barb. 9;

Van Rensselaer *v.* Hayes, 19 N. Y. 91; Matthews *v.* Ward, 10 Gill & J. 443; 4 Kent Com. 24; 11 Am. Jur. 94; 1 Story Const. 160; Cook *v.* Hammond, 4 Mason, 478.

6 Chisholm *v.* Georgia, 2 Dall. 470. Every acre of land in this country was, prior to the Revolution, held mediately or immediately by grants from the crown: Chisholm *v.* Georgia, 2 Dall. 470; and see Commonw. *v.* Alger, 7 Cush. 68; Commonw. *v.* Charlestown, 1 Pick. 180.

7 Jackson *v.* Ingraham, 4 Johns. 163; Jackson *v.* Hart, 12 Johns. 77; Chisholm *v.* Georgia, 2 Dall. 470; De Armas *v.* Mayor etc. 5 Mart. (La.) 132; 3 Kent Com. 307. Compare People *v.* Van Rensselaer, 8 Barb. 189, 253; Barlow *v.* Lambert, 28 Ala. 704.

8 Taylor *v.* Porter, 4 Hill, 143; Crosby *v.* Hanover, 36 N. H. 404; People *v.* Smith, 21 N. Y. 595; Kohl *v.* United States, 91 U. S. 367; § 256, *post.*

9 Commonw. *v.* Tewksbury, 11 Met. 55; Commonw. *v.* Alger, 7 Cush. 53, 86.

10 4 Kent Com. 3.

11 Matthews *v.* Ward, 10 Gill. & J. 443; Desilver's Case, 5 Rawle, 112; Wallace *v.* Harmstad, 44 Pa. St. 500; Cornell *v.* Lamb, 2 Cowen, 652; De Peyster *v.* Michael, 6 N. Y. 467; Bradley *v.* Dwight, 62 How. Pr. 300.

12 Rogers *v.* Jones, 1 Wend. 237; Johnson *v.* McIntosh, 8 Wheat. 543; Martin *v.* Wardell, 16 Peters, 367; Jackson *v.* Ingraham, 4 Johns. 163. See People *v.* Folsom, 5 Cal. 373; United States *v.* Cambutson, 20 How. 59.

13 Johnson *v.* McIntosh, 8 Wheat. 543.

14 Johnson *v.* McIntosh, 8 Wheat. 543.

15 Strong *v.* Waterman, 11 Paige, 607; Brashear *v.* Williams, 10 Ala. 630; Johnson *v.* McIntosh, 8 Wheat. 543; Brown *v.* Wenham, 10 Met. 495. Compare Fellows *v.* Lee, 5 Denio, 628; Stephens *v.* Westwood, 20 Ala. 275.

16 Johnson *v.* McIntosh, 8 Wheat. 543; Clark *v.* Williams, 19 Pick. 500; Goodell *v.* Jackson, 20 Johns. 693; 11 Am. Dec. 351.

CHAPTER III.

ESTATE TAIL.

§ 23. Definition and origin.
§ 24. General and special.
§ 25. Male and female.
§ 26. How created.
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§ 23. Definition and origin.—Inheritances *limited,* or such as are clogged with conditions or qualifications,

are, at common law, usually divided into (1) qualified or base fees; and (2) fees conditional[1] — afterwards denominated fees-tail, in consequence of the statute *de donis*.[2] A qualified or base fee is an estate having a qualification annexed thereto, and which must be determined whenever that qualification is at an end;[3] as where land is granted to A and his heirs, tenants of the manor of Dale, whenever the heirs of A cease to be tenants of that manor, their estate terminates.[4] Such an estate is deemed a fee, because it may possibly endure forever;[5] but it is termed a base fee, since its duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the title.[6] A conditional fee, at common law, was an estate limited to some particular heirs, exclusive of others;[7] as to the heirs of a man's body, or to the heirs male of his body.[8] This kind of limitation was construed to be a fee-simple, on condition that the grantee had the heirs prescribed;[9] therefore, if he had the specified issue, his estate became absolute by the performance of the condition, at least for the three purposes of alienation, forfeiture, and incumbrance.[10] So the grantee of a conditional fee might also alien the estate before issue had, and if issue were born after the alienation, the grantor was excluded during the existence of such issue;[11] and the issue were also bound by the alienation of their ancestor.[12] In case the grantee died without having had issue, the estate reverted to the grantor, who was at liberty to re-enter as for breach of condition.[13] But the grantee, after the birth of issue, could alien in fee, and afterwards repurchase the lands, thus acquiring an estate in fee-simple absolute that would descend to the heirs in general, according to the course of the common law.[14] This mode of construing conditional fees was, however, regarded with much disfavor by the nobility and great landed proprietors, who were desirous of perpetuating their possessions in their own families;[15] hence they procured the enactment of the

Statute of Westm. 2, 13 Edw. 1, c. 1, entitled the statute "*de donis conditionalibus.*"[16] The effect of this statute was to take away the power of alienation on the birth of issue.[17] The courts, in construing it, held that where an estate was limited to a man and the heirs of his body, the donee should not in future have a conditional fee, but considered that the estate was divided, by creating a particular estate in the donee, called an *estate tail*, subject to which the reversion in fee remained in the donor.[18] An estate tail is therefore described to be an estate of inheritance, deriving its existence from the statute *de donis*,[19] which is descendible to some particular heirs only of the person to whom it is granted, and not to his heirs general.[20]

1 2 Blackst. Com. 109; Co. Litt. 1 *b*; 1 Greenl. Cruise, 66, 67.

2 Stat. Westm. 2, 13 Edw. 1, c. 1.

3 2 Blackst. Com. 109; 4 Kent Com. 9; Walsingham's Case, Plow. 557.

4 2 Blackst. Com. 109; and see 1 Prest. Est. 431; Idle *v.* Cooke, 2 Raym. Ld. 1148; Doe *v.* Woodroffe, 10 Mees. & W. 608; Goodright *v.* Searle, 2 Wils. 29.

5 Walsingham's Case, Plow. 557.

6 2 Blackst. Com. 109, 110.

7 2 Blackst. Com. 110; 1 Greenl. Cruise, 66, 67.

8 Co. Litt. 19 *a*; 1 Spence Eq. Jur. 140.

9 Co. Litt. 19 *a*; Willion *v.* Berkeley, Plow. 233. Compare Buckworth *v.* Thirkell, 3 Bos. & P. 652.

10 2 Blackst. Com. 110, 111; 1 Greenl. Cruise, 68; and see Pearse *v.* Killian, 1 McMull. 231; Izard *v.* Izard, 1 Bailey Ch. 228; Croxall *v.* Shererd, 5 Wall. 268, 284.

11 1 Greenl. Cruise, 68; Co. Litt. 19 *a*.

12 Co. Litt. 19 *a*; 1 Greenl. Cruise, 68. See Willion *v.* Berkeley, Plow. 233, 247.

13 1 Greenl. Cruise, 68, 69; 4 Kent Com. 11.

14 2 Blackst. Com. 111; and see Butler *v.* Huestis, 68 Ill. 594; 18 Am. Rep. 589, 591; Croxall *v.* Shererd, 5 Wall. 284.

15 1 Greenl. Cruise, 69; 1 Spence Eq. Jur. 141.

16 See Co. Litt. 21; 2 Blackst. Com. 112; 4 Kent Com. 11, 12.

17 2 Blackst. Com. 112; 4 Kent Com. 12; 2 Prest. Est. 378.

18 Taylor *v.* Horde, 1 Burr, 115; 1 Greenl. Cruise, 69; and see Buxton *v.* Uxbridge, 10 Met. 87; Steel *v.* Cook, 1 Met. 281; Wight *v.* Thayer, 1 Gray, 284; Maslin *v.* Thomas, 8 Gill. 18.

19 Stat. Westm. 2, 13 Edw. 1, c. 1.

20 1 Greenl. Cruise, 70; 2 Prest. Est. 453. The very nature of an

estate tail is, that it is an estate of inheritance limited to a particular class of heirs: Wight *v.* Thayer, 1 Gray, 287; and see Hall *v.* Thayer, 5 Gray, 523.

§ 24. General and special.—An estate tail is either general or special.[1] The former is where lands and tenements are given to a man and the heirs of his body generally;[2] the latter is where the gift is restrained to certain heirs of the donee's body, exclusive of others.[3] Thus, if the gift be to one, and the heirs of his body begotten, it is an estate in tail general, because the donee's issue in general by any marriage is, in successive order, capable of inheriting the estate tail;[4] but if the gift be to a man and the heirs of his body on Mary his present wife to be begotten, it is an estate in tail special, the issue of the donee by any other wife being excluded.[5]

1 2 Blackst. Com. 113; Butler *v.* Huestis, 68 Ill. 594; 18 Am. Rep. 589, 592.

2 2 Blackst. Com. 113; 1 Greenl. Cruise, 70.

3 2 Blackst. Com. 113, 114.

4 2 Blackst. Com. 113; 1 Greenl. Cruise, 70; Co. Litt. 26 *b*.

5 2 Blackst. Com. 113, 114; 1 Greenl. Cruise, 70. See McKenzie *v.* Jones, 39 Miss. 230.

§ 25. Male and female.—Estates, both in general and special tail, may either be in tail male or tail female.[1] In case of an entail male, the heirs female are not inheritable;[2] nor, on the other hand, are the heirs male inheritable in case of a gift in tail female.[3] Therefore, if the donee in tail male has issue a daughter, who has issue a son, this son cannot inherit the estate, because he cannot deduce his descent wholly by heirs male.[4] So, if a man have two estates tail, the one in tail male, the other in tale female, and has issue a daughter who has issue a son, this son cannot succeed to either of the estates, for the reason that he cannot deduce his descent wholly either in the male or the female line.[5]

1 2 Blackst. Com. 114.

2 Co. Litt. 25; 1 Greenl. Cruise, 70, 71; and see Hulburt *v.* Emerson, 16 Mass. 241; Bernal *v.* Bernal, 3 Mylne & C. 559.

3 1 Greenl. Cruise, 70, 71; Denn v. Hobson, 5 Burr, 2609; 2 Black. W. 695; Oddie v. Woodford, 3 Mylne & C. 584.

4 2 Blackst. Com. 114; Hurlburt v. Emerson, 16 Mass. 241.

5 Co. Litt. 25 b; 2 Blackst. Com. 114; and see 1 Greenl. Cruise, 71; Wms. Real Prop. 30.

§ 26. How created.—It is necessary to the creation of an estate tail that there be a limitation to heirs of the donee's body.[1] The word "body," or some other words indicating procreation, are indispensable to make it a fee-tail, and ascertain to what heirs in particular the fee is limited;[2] and if either the words of inheritance or words of procreation be omitted, although the others are inserted in the grant, this will not make an estate tail.[3] But greater latitude has been given to the construction of wills then of deeds,[4] and an estate tail may be created by a devise to a man and his seed, or to a man and his posterity, or by other words which show an intention to restrain the inheritance to the descendants of the devisee.[5]

1 See 2 Prest. Est. 360; Altham's Case, 8 Rep. 154 b; Idle v. Cooke, 2 Raym. Ld. 1152; Corbin v. Healy, 20 Pick. 515; Williamson v. Daniel, 12 Wheat. 568.

2 Co. Litt. 20 b; 2 Blackst. Com. 114, 115; 2 Prest. Est. 480; and see Perry v. Kline, 12 Cush. 127; Atlin v. Bunce, 1 Root, 96; Pratt v. Flamer, 5 Har. & J. 10.

3 2 Blackst. Com. 115; 2 Prest. Est. 412; and see Butler v. Huestis, 68 Ill. 594; 18 Am. Rep. 589, 592; Baker v. Scott, 62 Ill. 86.

4 Ebby v. Ebby, 5 Pa. St. 461; Bowers v. Porter, 4 Pick. 198; § 16, *ante*.

5 Co. Litt. 9, 27; 2 Blackst. Com. 115; Wood v. Baron, 1 East, 259; Nightingale v. Burrell, 15 Pick. 104; Amelong v. Dormeyer, 16 Serg. & R. 323.

§ 27. What may be entailed.—Within the statute *de donis*, not only lands may be entailed, but also every species of incorporeal property of a real nature;[1] such as rents, estovers, commons, and the like.[2] So money directed to be laid out in the purchase of land is regarded in equity as land,[3] and may be entailed.[4] And, in general, if the thing be annexed to lands, or in any wise concern lands or relate to them, it may be entailed.[5] But mere personal chattels, not partaking of the realty, cannot be entailed;[6] as, for instance, an annuity, which charges

only the person, and not the lands, of the grantor.[7] Though if an annuity be granted to a man and the heirs of his body, the grantee has still a conditional fee at common law.[8]

1 Nevil's Case, 7 Rep. 33; 1 Greenl. Cruise, 72, 73; Child v. Baylie, Cro. (Jac.) 461.

2 2 Blackst. Com. 113; Co. Litt. 20 *a*.

3 See § 10, *ante*.

4 1 Greenl. Cruise, 73.

5 Nevil's Case, 7 Rep. 33; 2 Blackst. Com. 113; and see Atkinson v. Hutchinson, 3 P. Wms. 259; Stockton v. Martin, 2 Bay, 471.

6 2 Blackst. Com. 113; Co. Litt. 20 *a*; and see Dorr v. Wainwright, 13 Pick. 323; Adams v. Cruft, 14 Pick. 16, 25; Green v. Stevens, 19 Ves. 73.

7 Stafford v. Buckley, 2 Ves. Sr. 171; Aubin v. Daly, 4 Barn. & Ald. 59; Holdernesse v. Carmarthen, 1 Bro. C. C. 377.

8 Nevil's Case, 7 Rep. 33, 125; 2 Blackst. Com. 113.

§ 28. Who may be tenants.—All natural persons capable of holding estates of inheritance may be tenants in tail;[1] and it was early determined that the king was within the statute *de donis*, as well as any other person.[2]

1 1 Greenl. Cruise, 74.

2 Willion v. Berkeley, Plow. 227.

§ 29. Conveyance by tenant.—The tenant in tail was restrained by the statute *de donis* from alienating his estate for a longer term than that of his own life;[1] and this restriction was extended by construction to the issue *in infinitum*.[2] But it is not to be understood literally that the grantee had only an estate for life, which *ipso facto* determined by the death of the tenant in tail.[3] The meaning was, that the grantee's estate was certain and indefeasible only during the life of the tenant in tail, upon whose death it became defeasible by his issue.[4] In other words, the grantee acquired a base fee,[5] determinable on the death of the tenant in tail by the entry of the issue in tail.[6] But where something was granted out of an estate tail, as a rent, etc., such grant became absolutely void by the death of the grantor.[7] The issue in tail is not bound to complete any contract made by his ancestor

relative to the estate tail;[8] but if he does any act towards carrying such contract into effect, he will be compelled in equity to perform it.[9]

1 See 1 Greenl. Cruise, 77; Walsingham's Case, Plow. 554.

2 Reg. v. Fogossa, Plow. 13.

3 Machell v. Clarke, 2 Raym. Ld. 779.

4 Machell v. Clarke, 2 Raym. Ld. 779; Seymour's Case, 10 Rep. 96 *a*; 1 Greenl. Cruise, 78.

5 See § 23, *ante*.

6 Machell v. Clarke, 2 Raym. Ld. 779; Whiting v. Whiting, 4 Conn. 179.

7 Walter v. Bould, Bulst. 32.

8 Partridge v. Dorsey, 3 Har. & J. 302; 1 Greenl. Cruise, 84; Frank v. Mainwaring, 2 Beav. 115.

9 Frank v. Mainwaring, 2 Beav. 115; Wharton v. Wharton, 2 Vern. 3.

§ 30. How barred.—In England, estates tail were deemed to be very injurious to the industry and commerce of the nation, and many attempts were made in parliament to procure a repeal of the statute *de donis*.[1] These attempts were, however, unsuccessful, owing to the resistance of the great landed proprietors and their families, and no adequate relief was obtained against the national grievance, until a method was devised to evade the statute by means of common recoveries.[2] These were fictitious proceedings, introduced for the purpose of eluding the statute *de donis*, and established by resolution of the judges in Taltarum's Case, 12 Edw. 4, A. D. 1472.[3] They were subsequently noticed and indirectly sanctioned by various acts of parliament, and became to be regarded as mere forms of conveyances or common assurances.[4] They had the force and effect of an absolute bar, not only of all estates tail, but of remainders and reversions expectant on the determination of such estates.[5] But conveyances in England by fine and recovery are now abolished by statute, and estates tail can only be barred by a deed enrolled under the statute.[6]

1 See Co. Litt. 19 *b*; 4 Kent Com. 12, 13.

2 2 Blackst. Com. 116; Wms. Real Prop. 39. See Ransley v. Stott, 26 Pa. St. 126.

3 Year Book, 12 Edw. 4, 19; 2 Prest. Est. 454; 2 Blackst. Com. 357; 1 Spear Eq. 143. See Roseboom *v.* Van Vechten, 5 Denio, 414.

4 2 Blackst. Com. 357, 360, note; 4 Kent Com. 13; Dewitt *v.* Eldred, 4 Serg. & R. 421; Croxall *v.* Shererd, 5 Wall. 285.

5 Mildmay's Case, 6 Rep. 40; Mary Portington's Case, 10 Rep. 35; 2 Blackst. Com. 361; Martin *v.* Strachan, 5 Term Rep. 107, note.

6 Stats. 3 and 4 Will. 4, c. 74; and see Church *v.* Edwards, 2 Bro. C. C. 180; Egerton *v.* Earl etc. 1 Sim. (N. S.) 464; 7 Eng. L. & Eq. 170; Roseboom *v.* Van Vechten, 5 Denio, 414.

§ 31. Incidents to.—Among the incidents inseparably annexed to estates tail, the tenant may commit every kind of waste upon the premises; as by felling trees, pulling down houses, etc.[1] But he must exercise the power during his life;[2] and if he sells trees growing on the land, the vendee must cut them down during the life of the vendor, or they will descend with the land to the heir.[3] Other incidents of estates tail are the courtesy of the husband and the dower of the wife;[4] and, as already seen, an estate tail may be barred.[5] The tenant in tail is entitled to all deeds and muniments belonging to the lands,[6] and Chancery will compel their delivery over to him;[7] and he is not bound to pay off outstanding charges or encumbrances affecting the estate;[8] though he is bound in some cases to keep down the interest.[9] The doctrine of merger has no application to estates tail,[10] so that one may have at the same time, and in his own right, both an estate tail and the immediate reversion in fee-simple, in the same land.[11]

1 Hales *v.* Petit, Plow. 259; 2 Blackst. Com. 115, 116; Jervis *v.* Bruton, 2 Vern. 251; Att.-Gen. *v.* Duke of Marlborough, 3 Madd. 498.

2 Liford's Case, 11 Rep. 50 *a*.

3 Liford's Case, 11 Rep. 50 *a*; 1 Greenl. Cruise, 74.

4 2 Blackst. Com. 115, 116; Co. Litt. 224 *a*; and see Mandlebaum *v.* McDonnell, 29 Mich. 78; 18 Am. Rep. 72.

5 § 30, *ante*.

6 1 Greenl. Cruise, 75; Harrington *v.* Price, 3 Barn. & Adol. 170.

7 Jones *v.* Morgan, 1 Bro. C. C. 206.

8 Wharton *v.* Wharton, 2 Vern. 3; Partridge *v.* Dorsey, 3 Har. & J. 302.

9 1 Greenl. Cruise, 76.

10 Roe *v.* Boldwere, 5 Term. Rep. 110; Wiscot's Case, 2 Rep. 61 *a*.

11 Wiscot's Case, 2 Rep. 61 *a*; 1 Greenl. Cruise, 75.

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§ 32. How far recognized in the United States.—Estates tail were introduced into this country with other elements of the common law, and, prior to the Revolution, the use of a fine or common recovery in barring them had become universal.[1] But such estates were regarded as being contrary to public policy, and have accordingly been turned into estates in fee-simple absolute in the several States, by force of their respective statutes.[2] Or, if recognized, they are subject, nevertheless, to be barred by deed, and by common recovery.[3]

1 See Partridge *v.* Dorsey, 3 Har. & J. 302; Lyle *v.* Richards, 9 Serg. & R. 330; Allyn *v.* Mather, 9 Conn. 114; Van Rensselaer *v.* Kearney, 11 How. 297; Hawley *v.* Northampton, 8 Mass. 34; Jackson *v.* Van Zandt, 12 Johns. 169; Dennett *v.* Dennett, 40 N. H. 500. Fines were abolished in New York in 1830: McGregor *v.* Comstock, 17 N. Y. 162.

2 4 Kent Com. 14, 15. See Croxall *v.* Shererd, 5 Wall, 268; Morehouse *v.* Cotheal, 1 N. J. 480; Allyn *v.* Mather, 9 Conn. 114; Van Rensselaer *v.* Poucher, 5 Denio, 35; Redstrake *v.* Townsend, 39 N. J. L. 379; Watkins *v.* Sears, 3 Gill. 492; Den *v.* Fox, 5 Halst. 39; Albany Ins. Co. *v.* Bay, 4 N. Y. 9; Orndoff *v.* Turman, 2 Leigh, 200; 21 Am. Dec. 608; Jewell *v.* Warner, 35 N. H. 176; Posey *v.* Budd, 21 Md. 477; Cal. Civ. Code, § 763.

3 Nightingale *v.* Burrell, 15 Pick. 116; Weld *v.* Williams, 13 Met. 486; Laidler *v.* Young 2 Har. & J. 69; Lithgow *v.* Kavenah, 9 Mass. 161, 167. Compare Pollock *v.* Speidel, 17 Ohio St. 439.

CHAPTER IV.

ESTATE FOR LIFE.

§ 33. Definition.
§ 34. How created.
§ 35. *Pur autre vie.*
§ 36. Right to estovers and emblements.
§ 37. How affected by merger.
§ 38. Encumbrances, taxes, etc.
§ 39. Forfeiture.
§ 40. Praying in aid.
§ 41. Possession of title deeds.
§ 42. Alienation of estate.
§ 43. Termination of estate.

§ 33. Definition.—An estate for life is a freehold estate, not of inheritance, but which is confined to the life or lives of some particular person or persons, or to the

happening or not happening of some uncertain event.[1] The tenant for life has a right to the possession and usufruct, without having the absolute property and inheritance of the land itself, which is vested in some other person.[2]

1 1 Greenl. Cruise, 101; and see Foster v. Joice, 3 Wash. C. C. 498; Eldridge v. Preble, 34 Me. 151; Garland v. Crow, 2 Bail. (S. C.) 24; Dejarnatte v. Allen, 5 Gratt. 499; People v. Gillis, 24 Wend. 201.

2 1 Greenl. Cruise, 101, 102; Eldridge v. Preble, 34 Me. 151. A husband has, at common law, a life estate in lands of which his wife owns the fee: Eldridge v. Preble, 34 Me. 151.

§ 34. How created.—Estates for life are either conventional or legal.[1] The first are created by the act of some party, as by a deed or devise; and the second derive their existence from operation of law.[2] Conventional estates for life may be created by express words of disposition for the life of the grantee or devisee, or for the life of any other person, or for more lives than one;[3] they may also be created by a general disposition, without defining or limiting any specific estate.[4] Thus, if A grants land to B, without specifying the term of duration, and without words of limitation, B will take, at common law, an estate for life;[5] for, since no words of inheritance are mentioned in the grant, it cannot be construed to be a fee,[6] and as all grants are given that construction which is most favorable to the grantee,[7] he will be entitled to an estate during his own life, provided the grantor has authority to make such a grant.[8] Under a grant of lands to a man, his executors, administrators, and assigns, but without the word "heirs," the grantee takes only a life estate in the premises.[9] So a conveyance "to J. M. and his generation, to endure as long as the waters of the Delaware shall run," was held to pass no more than a life estate.[10] And if there are no words of inheritance in a bequest of real property, the estate is for life.[11]

1 2 Blackst. Com. 120; 4 Kent Com. 24.

2 4 Kent Com. 24; 1 Greenl. Cruise, 102; and see Stewart v. Clark, 13 Met. 79.

3 2 Blackst. Com. 120; Co. Litt. 41 *b*; Hewlins *v.* Shippam, 5 Barn. & C. 221.

4 Co. Litt. 42; 2 Blackst. Com. 120.

5 2 Blackst. 121; 4 Kent Com. 25.

6 See § 16, *ante*.

7 Co. Litt. 36; 2 Blackst Com. 121; § 304, *post*.

8 Co. Litt. 42 *a*; 2 Blackst. Com. 121.

9 Clearwater *v.* Rose, 1 Blackf. 137. See Morrall *v.* Sutton, 4 Beav. 478.

10 Foster *v.* Joice, 3 Wash. C. C. 498.

11 Witherspoon *v.* Dunlap, 1 McCord, 546; Jackson *v.* Embler, 14 Johns. 198.

§ 35. Pur autre vie.—Where the estate is for the life of another person, it is technically termed an estate *pur autre vie*, and he by whose life it is held is styled *cestui que vie*.[1] It is the lowest species of freehold, and is esteemed of less value than an estate for a man's own life.[2] In some respects it partakes of the nature of personal estate.[3]

1 Co. Litt. 42 *a*; 2 Blackst. Com. 258, 259; 1 Greenl. Cruise, 102.

2 See 2 Blackst. Com. 120; 4 Kent Com. 26; 1 Spence, Eq. Jur. 144.

3 Doe *v.* Luxton, 6 Term Rep. 289; Ripley *v.* Waterworth, 7 Ves. 425; and see Roseboom *v.* Van Vechten, 5 Denio, 414. Estates *pur autre vie* are now made the subject of statutory regulation in England, and, very generally so, in the United States: See 4 Kent Com. 27; 1 Greenl. Cruise, 111; 1 N. Y. Rev. Stats. 722; Doe *v.* Steele, 4 Ad. & E. 663.

§ 36. Right to estovers and emblements.—Every tenant for life is entitled to take *estovers* from the premises, in such quantity or amount as may be necessary to the full enjoyment and use of the land.[1] By estovers is meant an allowance of wood for fuel and fencing, and for the repair of buildings;[2] and the tenant for life may cut down timber trees, at seasonable times, for the two latter purposes;[3] but not to build new houses, or to repair those that he himself has improperly suffered to fall into decay;[4] nor can he sell the timber to purchase fuel.[5] So he must only cut such timber as he needs for present use and is fit for the purpose,[6] and it must be used by him upon the premises.[7] For the purposes of fuel, he is bound first to take the dry, fallen, and perish-

ing wood.[8] Tenant for life is likewise entitled to *emblements*,[9] or growing crops which yield an annual profit;[10] which the law gives to him, or if he is dead, to his executors or administrators, as a return for the labor and expense of tilling and sowing the ground.[11] The right to emblements includes the right to enter upon and cultivate the land and harvest the crops.[12]

1 Co. Litt. 41 *b*; 2 Blackst. Com. 35; Webster *v.* Webster, 33 N. H. 21; Smith *v.* Jewett, 40 N. H. 530. The extent of a life tenant's rights in the estate does not depend on his necessities: Robertson *v.* Meadors, 73 Ind. 43.

2 Heyden's Case, 13 Rep. 68; 1 Greenl. Cruise, 105. A life tenant is bound to keep the premises in repair: Matter of Steele, 19 N. J. Eq. 120.

3 Harder *v.* Harder, 26 Barb. 409; Gardiner *v.* Dering, 1 Paige, 573.

4 Co. Litt. 53 *a*; Miles *v.* Miles, 32 N. H. 147. But tenant for life may cut timber to use in mines already opened: Neel *v.* Neel, 19 Pa. St. 323; and see Findlay *v.* Smith, 6 Munf. 134; Den *v.* Kinney, 5 N. J. L. 552; Crockett *v.* Crockett, 2 Ohio St. 180. But compare Livingston *v.* Reynolds, 2 Hill, 157.

5 White *v.* Cutler, 17 Pick. 248; Padelford *v.* Padelford, 7 Pick. 152; and see Johnson *v.* Johnson, 18 N. H. 594; Doe *v.* Wilson, 11 East, 56; Miles *v.* Miles, 32 N. H. 147.

6 White *v.* Cutler, 17 Pick. 248; Georges *v.* Stanfield, Cro. Eliz. 593; Dunn *v.* Bryan, 7 Ired. Eq. 143.

7 Sarles *v.* Sarles, 3 Sand. Ch. 601; Elliott *v.* Smith, 2 N. H. 430. But compare Loomis *v.* Wilbur, 5 Mason, 13; Gardiner *v.* Dering, 1 Paige, 573.

8 Simmons *v.* Norton, 7 Bing. 640; Jackson *v.* Brownson, 7 Johns. 227. Whether the cutting is in good faith for estovers is for the jury to decide: Doe *v.* Wilson, 11 East. 56.

9 Co. Litt. 55 *a*; 2 Blackst. Com. 122; Reiff *v.* Reiff, 64 Pa. St. 134.

10 See Stewart *v.* Doughty, 9 Johns. 108; §§ 5, 9, *ante*.

11 Stewart *v.* Doughty, 9 Johns. 108; and see Forbes *v.* Shattuck, 22 Barb. 568; Thompson *v.* Thompson, 6 Munf. 514; Chesley *v.* Welch, 37 Me. 106.

12 Humphries *v.* Humphries, 3 Ired. 362; Forsyth *v.* Price, 8 Watts, 282. Compare Henderson *v.* Cardwell, 9 Baxt. 389; 40 Am. Rep. 93.

§ 37. How affected by merger.— Whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is said to be merged, that is, sunk or drowned in the greater.[1] Thus, whenever tenant for life acquires the absolute property or inheritance of the lands, his estate becomes merged or drowned in the fee-simple.[2] So an estate *pur autre vie* will merge in an estate for a man's own life, the

former being an inferior interest to the latter;[3] as where an estate is limited to a person for the life of another, remainder to himself for his own life, the first estate is merged.[4]

1 2 Blackst. Com. 177; James v. Morey, 2 Cowen, 246; 14 Am. Dec. 475; Roberts v. Jackson, 1 Wend. 484.

2 1 Greenl. Cruise, 104.

3 See § 35, *ante*.

4 Bowle's Case, 11 Rep. 83; 1 Greenl. Cruise, 104. Compare Co. Litt. 41 *b*.

§ 38. Encumbrances, taxes, etc.—Tenant for life is not bound to pay off an encumbrance charged on the inheritance;[1] and if compelled to do so, he becomes a creditor of the estate for the amount so paid.[2] He is, however, bound to pay the interest accruing upon all existing encumbrances during the continuance of his estate.[3] But a dowress is only bound to keep down one-third part of the accruing interest, because she takes only one-third part of the estate.[4] It is the duty of tenant for life to keep down the ordinary taxes assessed upon the land during his life;[5] and if he neglect to do so, a receiver may be appointed to take so much of the rent and income of the estate as is necessary to pay the taxes.[6] But extraordinary assessments and permanent improvements should be apportioned between the tenant for life and the remainder-man.[7]

1 House v. House, 10 Paige, 158; Warley v. Warley, 1 Bail. 397; Moseley v. Marshall, 27 Barb. 42; 22 N. Y. 200.

2 Moseley v. Marshall, 27 Barb. 42; 4 Kent Com. 74. Compare King v. Morris, 2 Mon. B. 104; Hunt v. Watkins, 1 Humph. 498; Wainwright v. Hardisty, 2 Beav. 363.

3 Penrhyn v. Hughes, 5 Ves. 99; Moseley v. Marshall, 22 N. Y. 200; Thomas v. Thomas, 17 N. J. Eq. 356.

4 Swaine v. Perine, 5 Johns. Ch. 482; 4 Kent Com. 74.

5 Cairns v. Chabert, 3 Edw. Ch. 312; Deraismes v. Deraismes, 72 N. Y. 154; Miller's Est. 1 Tuck. 346; Varney v. Stevens, 22 Me. 331; Patrick v. Sherwood, 4 Blatchf. (C. C.) 112.

6 Cairns v. Chabert, 3 Edw. Ch. 312; King v. King, 9 Jones & S. 516; Carter v. Youngs, 10 Jones & S. 418.

7 Peck v. Sherwood, 56 N. Y. 615; De Witt v. Cooper, 18 Hun, 67. As to insurance, see 18 Hun, 67; Graham v. Roberts, 8 Ired. Eq. 99; Brough v. Higgins, 2 Gratt. 408. See as to insurance: Kearney v. Kearney, 17 N. J. Eq. 59.

§ 39. Forfeiture.—Estates for life may, at common law, be forfeited because of certain acts done by the tenant;[1] as where he undertakes to convey by feoffment, with livery, a greater estate or interest than he himself owns.[2] So if tenant for life levied a fine, or suffered a common recovery, a forfeiture was thereby incurred.[3] But a bargain and sale, lease and release, or other conveyance under the statute of uses, could not work a forfeiture or discontinuance of the estate;[4] it being a general rule that no alienation which is not made by livery of seizin, or by that which is equivalent, can work a discontinuance.[5] And it has been held in this country that even a feoffment created no forfeiture;[6] in accordance with the doctrine generally adopted, that a man's deed or grant shall be good and valid for so much as he has a right to, and void for the rest.[7] And in many of the States this is declared to be the law by statute.[8]

1 Co. Litt. 251; 2 Blackst. Com. 274; and see Stump *v.* Findlay, 2 Rawle, 168; Ackland *v.* Lutley, 9 Ad. & E. 879.

2 1 Greenl. Cruise, 108, 109; Grant *v.* Chase, 17 Mass. 446; Redfern *v.* Middleton, 1 Rice, 459; and see Jackson *v.* Mancius, 2 Wend. 357, 365; French *v.* Rollins, 21 Me. 372.

3 1 Greenl. Cruise, 109; Stump *v.* Findlay, 2 Rawle, 168; Grant *v.* Chase, 17 Mass. 446. Compare Dawson *v.* Dawson, Rice, 243; Salmon *v.* Clagett, 3 Bland, 172.

4 Bell *v.* Twilight, 22 N. H. 500; McKee *v.* Pfout, 3 Dall. 486; Pendleton *v.* Vandevier, 1 Wash. C. C. 381.

5 Stevens *v.* Winship, 1 Pick. 318; 11 Am. Dec. 178.

6 Rogers *v.* Moore, 11 Conn. 553; and see Williams *v.* Robinson, 16 Conn. 522.

7 Rogers *v.* Moore, 11 Conn. 553; and see 4 Kent Com. 106; Stevens *v.* Winship, 1 Pick. 318; 11 Am. Dec. 178; Rosseel *v.* Jarvis, 15 Wis. 571; Hurd *v.* Cushing, 7 Pick. 169; Moore *v.* Luce, 29 Pa. St. 263.

8 See 1 Greenl. Cruise, 109; 4 Kent Com. 106; 1 N. Y. Rev. Stat. 739; Smith *v.* Shackleford, 9 Dana, 475; Davis *v.* Whitesides, 1 Bibb, 512; Dennett *v.* Dennett, 40 N. H. 505; Grout *v.* Townshend, 2 Hill, 554; Christie *v.* Gage, 71 N. Y. 189.

§ 40. Praying in aid.—As incident to an estate for life, it was the duty of the tenant to defend the title in all real actions at common law; and to enable him to do so, he might "pray in aid," or call for the assistance of the person entitled to the inheritance, because the former

was not generally supposed to have in his custody the evidences of title.[1] The custom of "praying in aid" seems to have passed away with the abolition of real actions.[2]

1 1 Greenl. Cruise, 106. See Sohier v. Williams, Curt. 479.

2 See 1 Spence Eq. Jur. 225; 1 Prest. Est. 207.

§ 41. Possession of title deeds.—In England, where the preservation of the title deeds is a matter of much greater importance than in this country,[1] the question has been raised as to when and how far a tenant for life has a right to their custody.[2] And it is held that, *prima facie*, the tenant for life has a right to hold the title deeds of the estate;[3] and the court will not take them out of his hands, in the absence of evidence of spoliation.[4] It was, however, said that ordering title deeds into court was an ordinary relief of remainder-man, or reversioner in fee, against the tenant for life.[5] And in the case of a jointress, the court will order her to deliver up title deeds, upon her jointure being confirmed.[6]

1 See 2 Blackst. Com. 428; Wms. Real Prop. 375; Scanlan v. Wright, 13 Pick. 523; Hathaway v. Spooner, 9 Pick. 23.

2 See Hicks v. Hicks, Dick. 650; Dryden v. Frost, 3 Mylne & C. 670; Burges v. Mawbey, 1 Turn. & R. 174; Ivie v. Ivie, 1 Atk. 431.

3 Ford v. Peering, 1 Ves. Jr. 72; Duncombe v. Mayer, 8 Ves. Jr. 323; Bowles v. Stewart, 1 Schoales & L. 223; Shaw v. Shaw, 12 Price, 163; Allwood v. Heywood, 1 Hurl. & C. 745.

4 Smith v. Cooke, 3 Atk. 378; Crop v. Norton, 2 Atk. 74.

5 Southby v. Stonehouse, 2 Ves. 612.

6 Ford v. Peering, 1 Ves. Jr. 72; Senhouse v. Earl, 2 Ves. Sr. 450; Leech v. Trollop, 2 Ves. Sr. 662.

§ 42. Alienation of estate.—Every tenant for life has the power of alienating his whole estate, or of creating any estate less than his own, unless restrained by condition.[1] But if he seeks to create a greater estate, the effort must necessarily be void for the excess, as no one can give what he has not.[2] And conveyance of a life estate, to be valid, must be by deed.[3]

1 1 Greenl. Cruise, 108; Jackson v. Van Hoesen, 4 Cowen, 325

2 Jackson v. Van Hoesen, 4 Cowen, 325. Compare § 39, *ante*.

3 Stewart v. Clark, 13 Met. 79; People v. Gillis, 24 Wend. 201. See, as to alienation of estate for life under English "Succession Duty Act": In re Cooper etc. Law R. 4 Ch. Div. 802; 21 Eng. R. 725.

§ 43. Termination of estate.—Ordinarily, estates for life will endure as long as the life or lives for which they are granted.[1] But if the estate be made to depend upon a future contingency, as if it be given to a woman during her widowhood,[2] or to a man and a woman during coverture, or as long as the grantee shall dwell in a particular house;[3] in any such case, the grantee takes an estate for life, determinable upon the happening of the event on which the contingency depended.[4] A lease without special limitation, made by tenant for life, will be construed an estate for the life of the lessor;[5] for if it should be a lease for the life of the lessee, it would be a wrong to him in reversion.[6] An estate for life will terminate upon the death of the tenant;[7] and the absence of the tenant for life from the State or Commonwealth for the space of seven years,[8] without being heard from, furnishes ground for presuming him to be dead, and the next succeeding owner may enter upon the estate.[9]

1 See § 33, *ante*; Williams v. Caston, 1 Strob. 130.

2 Walsh v. Matthews, 11 Mo. 131; Dale v. Dale, 13 Pa. St. 446; and see Roseboom v. Van Vechten, 5 Denio, 414; Craig v. Watts, 8 Watts, 498.

3 1 Greenl. Cruise, 102; Co. Litt. 42 *a*; Jackson v. Myers, 3 Johns. 388.

4 Co. Litt. 42 *a*; 4 Kent, Com. 26; Hurd v. Cushing, 7 Pick. 169; Cook v. Bisbee, 18 Pick. 527; People v. Gillis, 24 Wend. 201.

5 Jackson v. Van Hoesen, 4 Cowen, 325.

6 Co. Litt. 42 *b*; Whittome v. Lamb, 12 Mees. & W. 318.

7 Williams v. Caston, 1 Strob. 130.

8 See 1 N. Y. Rev. Stat. 749, § 6; Eagle's Case, 3 Abb. Pr. 218, 220; McCartee v. Camel, 1 Barb. Ch. 455, 462; Commonw. v. Thompson, 6 Allen, 591; Newman v. Jenkins, 10 Pick. 515; Clarke v. Cummings, 5 Barb. 339; Spencer v. Roper, 13 Ired. 333.

9 Woods v. Woods, 2 Bay, 476; Gerry v. Post, 18 How. Pr. 118; Clark v. Owens, 18 N. Y. 434.

CHAPTER V.

COURTESY.

§ 44. Definition and origin.
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§ 44. Definition and origin.—Courtesy, or tenancy by the courtesy of England, is an estate for life, thrown upon the tenant by operation of law,[1] and is said to partake more of the character of an estate acquired by descent than by purchase.[2] It was established in the English law at a very early period,[3] and is described to be "where a man marries a woman seized of an estate of inheritance—that is, of lands and tenements in fee-simple or fee-tail—and has by her issue, born alive, which was capable of inheriting her estate. In this case, he shall, on the death of his wife, hold the lands for his life, as tenant by the courtesy of England."[4] The interest of a tenant by the courtesy is a legal estate in the land for the term of his natural life, and not a mere charge or encumbrance.[5]

1 Co. Litt. 18 *b*. No estate by courtesy is allowed in California: Cal. Civ. Code, § 173.

2 Watson *v.* Watson, 13 Conn. 83; and see Pemberton *v.* Hicks, 1 Binn. 1.

3 See 1 Greenl. Cruise, 139, 140; 2 Blackst. Com. 126, 127; 4 Kent. Com. 27, 28.

4 2 Blackst. Com. 126; 1 Greenl. Cruise, 140. And see Buckworth *v.* Thirkell, 3 Bos. & P. 652.

5 Co. Litt. 30 *a*; Adair *v.* Lott, 3 Hill, 182; and see Foster *v.* Marshall, 34 Me. 491; Heath *v.* White, 5 Conn. 235. The right to the tenancy by courtesy has not been taken away in New York by the statutes relating to the property of married women: Leach *v.* Leach, 21 Hun, 382. Nor does the provision of the Ohio statute, as to courtesy and dower, affect the rights of a husband in the lands of his wife during her life-time: Denny *v.* McCabe, 35 Ohio St. 576. See Brown *v.* Clark, 44 Mich. 309.

§ 45. Requisites.—Four things are requisite at common law to constitute a tenancy by the courtesy; namely, marriage, seizin of the wife, issue born alive, and death of the wife.[1] If the marriage be void, the man acquires no right to courtesy;[2] otherwise if it be voidable merely, and is not annulled during the life of the wife.[3]

1 Menville's Case, 13 Code R. 23; Jackson *v.* Johnson, 5 Cowen, 74, 95; 15 Am. Dec. 433; Furguson *v.* Tweedy, 56 Barb. 168; 43 N. Y. 543.

2 2 Blackst. Com. 127; 1 Greenl. Cruise, 140.

3 1 Greenl. Cruise, 140.

§ 46. Seizin.—The general rule, according to the English law is, that the wife must have been seized in fact and in deed, and not merely in law,[1] of an estate of inheritance, to entitle the husband to his courtesy.[2] But this doctrine has been modified by the judicial determinations of many of the States, and it is deemed sufficient that the wife had title to the lands, etc., and a potential seizin, or right of seizin.[3] Wild, unoccupied, or waste lands, not held adversely, may be constructively in the actual possession of the wife.[4] So a recovery in ejectment by the husband and wife has been held equivalent to an actual entry.[5] And the possession of a lessee under a lease reserving rent is an actual seizin, so as to entitle the husband to a life estate in the land as a tenant by the courtesy, though he has never received or demanded rent during the life of his wife.[6] So the occupancy of the land by part of several coparceners has been held sufficient to make the husband tenant by the courtesy of his wife's part, though neither she nor her husband had ever lived upon or exercised any act of ownership over the land.[7] It is not necessary that there should be seizin and issue at the same time.[8] Therefore, if the wife be seized of lands during coverture, and then be disseized, and afterward have issue, the husband shall be tenant by the courtesy of those lands;[9] and so if the wife become seized after issue born, though the issue die before her seizin.[10]

1 See § 20, *ante*.

2 1 Greenl. Cruise, 140; Adams v. Logan, 6 Mon. 179; Furguson v. Tweedy, 56 Barb. 168; 43 N. Y. 543; Gibbs v. Esty, 22 Hun, 266; and see Ferguson v. Tweedy, 43 N. Y. 548.

3 Kline v. Beebe, 6 Conn. 494; Bush v. Bradley, 4 Day, 298; Adair v. Lott, 3 Hill, 182; M'Corry v. King, 3 Humph. 267; Stephens v. Hume, 21 Mo. 349; McKee v. Cottle, 6 Mo. App. 416; Chew v. Commissioners etc. 5 Rawle, 160; Merritt v. Horne, 5 Ohio St. 307; Jackson v. Johnson, 5 Cowen, 74; 15 Am. Dec. 433.

4 Davis v. Mason, 1 Peters, 506; Wells v. Thompson, 13 Ala. 793; Day v. Cochran, 24 Miss. 277; Jackson v. Sellick, 8 Johns. 262; Mercer v. Selden, 1 How. 37, 54. *Contra:* Neely v. Butler, 10 Mon. B. 48.

5 Ellsworth v. Cook, 8 Paige, 643.

6 Ellsworth v. Cook, 8 Paige, 643; Jackson v. Johnson, 5 Cowen, 74; Powell v. Gossom, 18 Mon. B. 179; Lowry v. Steele, 4 Ham. 170; Tayloe v. Gould, 10 Barb. 388; Carter v. Williams, 8 Ired. Eq. 177.

7 Carr v. Givens, 9 Bush, 679; 15 Am. Rep. 747; and see DeGrey v. Richardson, 3 Atk. 469; Buckley v. Buckley, 11 Barb. 43.

8 1 Greenl. Cruise, 141; Comer v. Chamberlain, 6 Allen, 166, 169; Stewart v. Ross, 50 Miss. 776.

9 Jackson v. Johnson, 5 Cowen, 74.

10 Jackson v. Johnson, 5 Cowen, 74.

§ 47. Birth of issue.—In the case of a tenancy be the courtesy, it is well settled that the issue must by born alive in the life-time of the mother to entitle the father to the estate.[1] Even the delivery of the child alive by the Cæsarean operation, after the death of the mother, is not sufficient.[2] So the issue must be capable of inheriting the estate,[3] or be such as by possibility may inherit.[4]

1 2 Blackst. Com. 127, 128; and see Porch v. Fries, 3 Green, (N. J.) 204.

2 2 Blackst. Com. 128; 1 Greenl. Cruise, 143; Marsellis v. Thalhimer, 2 Paige, 35; and see Matter of Winne, 1 Lans. 508; 2 Lans. 21; Ryan v. Freeman, 36 Miss. 175. Issue of the marriage is no longer essential in some of the States: see 4 Kent Com. 29; 1 Greenl. Cruise, 143, note; Lancaster Bank v. Stauffer, 10 Pa. St. 399; Dubs v. Dubs, 31 Pa. St. 154. In Massachusetts, the birth of living issue, after conveyance by a married woman of land held by her to her sole use, entitles her husband to courtesy: Comer v. Chamberlain, 6 Allen, 166.

3 Paine's Case, 8 Rep. 34; Heath v. White, 5 Conn. 228; Day v. Cochran, 24 Miss. 261.

4 Paine's Case, 8 Rep. 34; 1 Greenl. Cruise, 143.

§ 48. Death of wife.—After the birth of issue, the husband is called tenant by the courtesy *initiate*,[1] but this estate does not become *consummate* until the death of the wife.[2] The death of the wife is one of the four essential requisites to constitute a tenancy by the courtesy.[3] But

immediately upon her death the estate vests in the husband,[4] and he takes it with all the incumbrances which would affect it in her possession if she were living.[5] And the interest of the husband as tenant by the courtesy initiate, as well as the estate consummate, is liable to be taken for his debts;[6] and he cannot, by any refusal to take the property, defeat the claims of his creditors.[7] And a voluntary settlement of it upon a wife is void as it respects creditors.[8]

1 Co. Litt. 40; 2 Blackst. Com. 128. See Wilson v. Arents, 70 N. C. 670; Foster v. Marshall, 22 N. H. 491; Chambers v. Handley, 3 Marsh. J. J. 98.

2 2 Blackst. Com. 128; Henderson v. Oldham, 5 Dana, 254; Marsellis v. Thalhimer, 2 Paige, 35; Matter of Winne, 2 Lans. 21; reversing S. C. 1 Lans. 508.

3 Wheeler v. Hotchkiss, 10 Conn. 225, 230; and see § 45, *ante*.

4 Watson v. Watson, 13 Conn. 83; Witham v. Perkins, 2 Me. 400.

5 2 Crabb Real. Prop. 119; and see Matter of Winne, 2 Lans. 21.

6 Day v. Cochran, 24 Miss. 261; Plumb v. Sawyer, 21 Conn. 351; Roberts v. Whiting, 16 Mass. 186; Mattock v. Stearns, 9 Vt. 326; Burd v. Dansdale, 2 Binn. 80; and see Matter of Winne, 1 Lans. 508; Bunn v. Daly, 24 Hun, 526.

7 Watson v. Watson, 13 Conn. 83.

8 Wickes v. Clarke, 8 Paige, 161; Van Duzer v. Van Duzer, 6 Paige, 366.

§ 49. Alienage.—All persons generally who are capable of taking freehold estates may be tenants by the courtesy.[1] But at common law an alien cannot take an estate by operation of law,[2] and cannot therefore be tenant by the courtesy.[3] In most of the States this rule has, however, been altered by statute.[4]

1 See 1 Greenl. Cruise, 144.

2 See § 19, *ante*; Hatfield v. Sneden, 54 N. Y. 280, 285.

3 Reese v. Waters, 4 Watts & S. 145; Foss v. Crisp, 20 Pick. 121; Copeland v. Sands, 1 Jones (N. C.) 70. Compare Calvin's Case, 7 Rep. 25 *a*; Doe v. Rogers, 1 Car. & K. 390; Mussey v. Pierre, 25 Me. 559.

4 See § 19, *ante*.

§ 50. What estates subject to.—Estates of inheritance only are subject to courtesy;[1] but it applies to qualified as well as to absolute estates in fee.[2] The question whether the right to courtesy continues after the

estate of the wife has determined by limitation, or by an executory devise, has, however, been elaborately discussed, resulting in a division of opinion in the courts, which is said to be irreconcilable.[3] The affirmative view seems to prevail in most of the States,[4] and this view is also best sustained by the English authorities.[5] The husband may be a tenant by the courtesy of money directed or agreed to be laid out in land;[6] or of an equity of redemption;[7] and very generally in this country he may be tenant by the courtesy of any equitable estate of inheritance of the wife.[8] But an estate by the courtesy cannot attach to a mere remainder;[9] as if there be an outstanding estate for life, the husband cannot be the tenant by the courtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during the coverture.[10] But where a life estate and the immediate reversion meet in the same person, the particular estate is merged in the greater estate;[11] and if the two estates unite in a *feme-covert*, her husband is entitled to a life estate as tenant by the courtesy.[12] It has been stated to be the settled doctrine of the law that the husband cannot be tenant by the courtesy of the separate real estate of his wife.[13] But where the intention to prevent courtesy is not clear, courts of equity will favor the husband's right.[14] And it has been held that the intent to cut off the husband's right to the courtesy must in some form be expressed;[15] and that words which merely create a separate estate in the wife during coverture, or which merely deprive the husband of any right to control the estate during coverture or to make it liable for his debts, will not be sufficient for the purpose.[16] And it is now held to be settled that where a married woman has an equitable estate of inheritance to her separate use, and does not dispose of it by deed or will, her husband is entitled to courtesy.[17]

1 Sumner *v.* Partridge, 2 Atk. 47; Boothby *v.* Vernon, 9 Mod. 147; Simmons *v.* Gooding, 5 Ired. Eq. 382.

2 Paine's Case, 8 Co. Rep. 34; 1 Greenl. Cruise, 146, 147; 4 Kent Com. 32.

3 See Hatfield v. Sneden, 54 N. Y. 284.

4 Hatfield v. Sneden, 54 N. Y. 280; Northcott v. Whipp, 12 Mon. B. 65; Thornton v. Knapp, 37 Pa. St. 391; and see 1 Washb. Real Prop. 135; 4 Kent Com. 30; Evans v. Evans, 9 Pa. St. 190; Taliaferro v. Burwell, 4 Call, 321.

5 Buckworth v. Thirkell, 3 Bos. & P. 652, note; Moody v. King, 2 Bing. 447; 9 Eng. C. L. 475; Smith v. Spencer, 6 De Gex, M. & G. 631. But see Doe v. Hutton, 3 Bos. & P. 653; Weller v. Weller, 28 Barb. 589.

6 Sweetapple v. Bindon, 2 Vern. 536; Dodson v. Hay, 3 Bro. C. C. 404; Davis v. Mason, 1 Peters, 503; and see Clipper v. Livergood, 5 Watts, 115. A tenant by the courtesy is entitled to interest for life on the proceeds of lands devised to his wife, and sold after her death by the executors of the devisor under a direction in the will: Dunscomb v. Dunscomb, 1 Johns. Ch. 508; 7 Am. Dec. 504.

7 1 Greenl. Cruise, 148; Boothby v. Vernon, 9 Mod. 147.

8 Robison v. Codman, 1 Sum. 128; Dubs v. Dubs, 31 Pa. St. 154; Rawlings v. Adams, 7 Md. 54; Robb v. Griffin, 26 Miss. 579; Houghton v. Hopgood, 13 Pick. 154; Cushing v. Blake, 29 N. J. Eq. 399; 30 N. J. Eq. 689; Taylor v. Smith, 54 Miss. 50; Withers v. Jenkins, 14 S. C. 597.

9 Stoddard v. Gibbs, 1 Sum. 263; 1 Greenl. Cruise, 149; Shores v. Carley, 8 Allen, 425.

10 Tayloe v. Gould, 10 Barb. 388; Ferguson v. Tweedy, 43 N. Y. 543; Hitner v. Ege, 23 Pa. St. 305; Bank v. Davis, 31 Ala. 626; Mackey v. Proctor, 12 Mon. B. 433; Doe v. Rivers, 7 Term Rep. 272; Redus v. Hayden, 43 Miss. 633.

11 See § 37, *ante*.

12 Tayloe v. Gould, 10 Barb. 388.

13 See Bottoms v. Corley, 5 Heisk. 6; Pool v. Blakie, 53 Ill. 495; Hearle v. Greenbank, 1 Ves. Sr. 298; 3 Atk. 716; Moore v. Webster, Law R. 3 Eq. 267.

14 See Dubs v. Dubs, 31 Pa. St. 149; Steadman v. Pulling, 3 Atk. 423; Morgan v. Morgan, 5 Madd. 248; Payne v. Payne, 11 Mon. B. 138; Wightman's Appeal, 29 Pa. St. 280; Tremmel v. Kleiboldt, 6 Mo. App. 549.

15 Carter v. Dale, 3 Lea, 710; 31 Am. Rep. 660; and see Baker v. Heiskell, 1 Cold. 642; Frazer v. Hightower, 12 Heisk. 94; Burnet v. Davis, 2 P. Wms. 316; Hardy v. Van Harlingen, 7 Ohio St. 208; Stokes v. M'Kibbin, 13 Pa. St. 267; Douglas v. Cruger, 80 N. Y. 15; Ege v. Medlar, 82 Pa. St. 86.

16 Carter v. Dale, 3 Lea, 710; 31 Am. Rep. 660; and see Matter of Winne, 2 Lans. 503; Hatfield v. Sneden, 54 N. Y. 280; Jones v. Brown, 1 Md. Ch. 191; Sayers v. Wall, 26 Gratt. 354.

17 Cooper v. Macdonald, Law Rep. 7 Ch. Div. 288; 23 Eng. R. 581.

§ 51. Forfeiture.—By the English law, if a tenant by the courtesy made a feoffment of the lands, it was a forfeiture of his estate.[1] But it has generally been held in this country that a conveyance in fee by the husband, of his wife's land, does not operate as a forfeiture of his right to courtesy.[2] At common law, a husband does not

forfeit his right to courtesy by abandoning his wife and living in adultery with another woman.[3] But it has been held in many of the States that the effect of a divorce *a vinculo*, obtained against the husband by the wife, is to terminate the former's right to courtesy.[4] If a deed from a woman to her affianced husband, which was procured by the latter through undue influence, be set aside after marriage, the husband's right to tenancy by courtesy re-attaches.[5]

1 1 Greenl. Cruise, 150; and see § 39, *ante*.

2 See Miller *v.* Miller, Meigs, 484; Dennett *v.* Dennett, 40 N. H. 505; § 39, *ante*. Compare French *v.* Rollins, 21 Me. 372; Koltenbrock *v.* Cracraft, 36 Ohio St. 584.

3 1 Greenl. Cruise, 150; and see Smoot *v.* Lecatt, 1 Stew. 590.

4 Wheeler *v.* Hotchkiss, 10 Conn. 225; Starr *v.* Pease, 8 Conn. 541; Oldham *v.* Henderson, 5 Dana, 256; Howey *v.* Goings, 13 Ill. 95; Barber *v.* Root, 10 Mass. 260. And such is the rule very generally fixed by statute in the different States: see 2 N. Y. Rev. Stat. 146.

5 Gilmore *v.* Burch, 7 Oreg. 374; 33 Am. Rep. 710. In Massachusetts, a married woman may, by a will duly executed with her husband's written assent, dispose of all her real estate, so as to cut off his right as tenant by the courtesy: Silsby *v.* Bullock, 10 Allen, 94.

CHAPTER VI.

DOWER.

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§ 52. Origin and history.—Dower is also an estate for life, created by act of law,[1] and it is that which a widow acquires in a certain portion of her husband's real property, after his death, for her support and the nurture and education of her children.[2] The term "dower" has reference only to real property.[3] The right of dower is said to be of German origin;[4] but dower was probably brought into England by the Normans.[5] There were several species of it known to the English law,[6] but the only kind generally adopted in the United States was that known as "dower at common law."[7] This species is fully described to be "where a man is seized of an estate of inheritance, and dies in the life-time of his wife, in which case she is at common law entitled to be endowed, for her natural life, of the third part of all the lands whereof her husband was seized, either in deed or in law, at any time during the coverture, and of which any issue which she might have had might by possibility have been heir."[8] In most of the States dower will be found to exist substantially in the form here described.[9] But important modifications have been made by statute in some of the States,[10] and also in England.[11]

1 Lawrence *v.* Miller, 1 Sand. 516; Brackett *v.* Leighton, 7 Me. 285; Davis *v.* Tingle, 8 Mon. B. 539; Holmes *v.* M'Gee, 12 Smedes & M. 411.

2 Co. Litt. 30 *a*; 2 Blackst. Com. 129; 1 Greenl. Cruise, 151; 4 Kent Com. 35.

3 Dow *v.* Dow, 36 Me. 211.

4 1 Greenl. Cruise, 150. See Combs *v.* Young, 4 Yerg. 218; Wright *v.* Jennings, 1 Bail. 277; Hill *v.* Mitchell, 5 Ark. 608.

5 4 Kent Com. 35, note. Compare 2 Blackst. Com. 129.

6 See 2 Blackst. Com. 132; Doe *v.* Gwinnel, 1 Ad. & E. (N. S.) 682.

7 See 1 Greenl. Cruise, 153, note; 4 Kent Com. 36.

8 4 Kent Com. 35; and see 2 Blackst. Com. 129; House *v.* Jackson, 50 N. Y. 161; Atwood *v.* Atwood, 22 Pick. 283; Butler *v.* Cheatham, 8 Bush, 554; Gray *v.* McCune, 23 Pa. St. 447. Dower, when founded on a legal seizin, is a pure legal right: Ocean Beach Assoc. *v.* Brinley, 34 N. J. Eq. 439.

9 See McMahan *v.* Kimball, 3 Blackf. 6; Hudson *v.* Steere, 9 R. I.

106; O'Ferrall v. Simplot, 4 Iowa, 381; Burke v. Barron, 8 Iowa, 134; Sutton v. Askew, 66 N. C. 172; 8 Am. Rep. 500; Heimershits v. Bernhard, 1 Har. (Del.) 518. No estate in dower exists in California: Cal. Civ. Code, § 173.

10 See Sturgis v. Ewing, 18 Ill. 176; Strong v. Clem, 12 Ind. 40; Beard v. Knox, 5 Cal. 252; Moore v. Kent, 37 Iowa, 20; 18 Am. Rep. 1; Rausch v. Moore, 48 Iowa, 611; 30 Am. Rep. 412; Wait v. Wait, 4 Barb. 192, 201.

11 See Stats. 3 and 4 Wm. 4, c. 105.

§ 53. Favored in law.—The wife is said to have an equitable and moral right to dower,[1] and hence the claim of dower is always favored in a high degree by law.[2] The inchoate right of the wife to dower is as much entitled to protection as the vested rights of the widow.[3] It is an interest and a right of which she cannot be divested, except by her consent or crime, or by her dying before her husband;[4] and to protect and preserve which she has a right of action.[5] And she may, during the life-time of her husband, maintain an equitable action for the protection of her inchoate right of dower from the fraudulent acts of her husband.[6]

1 Co. Litt. 124 *b*; Banks v. Sutton, 2 P. Wms. 702; Kennedy v. Nedrow, 1 Dall. 417.

2 Lasher v. Lasher, 13 Barb. 106; Mahon v. Smith, 60 How. Pr. 385; Meigs v. Dimock, 6 Conn. 462.

3 Matthews v. Duryee, 4 Keyes, 525; 3 Abb. Ct. App. 220; Simar v. Canaday, 53 N. Y. 298; 13 Am. Rep. 523. Compare Moore v. Mayor etc. 8 N. Y. 110; Lucas v. Sawyer, 17 Iowa, 517.

4 Bullard v. Briggs, 7 Pick. 533; Petty v. Petty, 4 Mon. B. 215; and see Curry v. Curry, 10 Hun. 366. Dower is not barred by a sale of the husband's lands in bankruptcy: Lazear v. Porter, 87 Pa. St. 513; 30 Am. Rep. 380. See Dudley v. Easton, 104 U. S. 99.

5 Petty v. Petty, 4 Mon. B. 215; Simar v. Canaday, 53 N. Y. 298; 13 Am. Rep. 523.

6 Buzick v. Buzick, 44 Iowa, 259; 24 Am. Rep. 740.

§ 54. Lex loci in respect to.—Dower is not the result of contract, but a positive institution of the State, founded on reasons of public policy.[1] And the right of the widow to dower in any particular case is to be determined by the law of the place where the subject-matter of the claim is located.[2] Thus, a woman who is married and domiciled in Louisiana is, nevertheless, on the death of her husband, entitled to dower in lands of which he

was seized in Mississippi, although dower is not recognized by law in the former State.[3] So, as a general rule, the dower right of the widow is to be determined by the law in force at the time of the death of the husband.[4] But where a married man conveyed lands, and afterward died, and intermediate the conveyance and his death a statute was enacted enlarging the common-law right of dower so as to give a widow an estate in fee, his widow was held to be entitled to dower only according to the law in force at the time of the conveyance.[5]

1 Moore *v.* Mayor etc. 8 N. Y. 110. Compare Schiffer *v.* Pruden, 64 N. Y. 47.

2 Lamar *v.* Scott, 3 Strob. 562; Story Confl. Laws, § 448; Apperson *v.* Bolton, 29 Ark. 418.

3 Duncan *v.* Dick, Walk. (Miss.) 281.

4 Lucas *v.* Sawyer, 17 Iowa, 517; Sturdevant *v.* Norris, 30 Iowa, 65; Ware *v.* Owens, 42 Ala. 212.

5 Moore *v.* Kent, 37 Iowa, 20; 18 Am. Rep. 1. Compare Johnson *v.* Vandyke, 6 McLean, 422; Kennerly *v.* Missouri Ins. Co. 11 Mo. 204.

§ 55. Requisites of dower.—The three requisites of dower at common law are marriage, seizin of the husband at some time during the existence of the coverture, and death of the husband.[1] The wife's right to dower attaches on the lands as soon as there is a concurrence of marriage and seizin.[2] But the marriage must be a legal one,[3] and if void, there shall be no dower;[4] though if it be voidable only, and is not dissolved during the life of the husband, the widow will be entitled to dower.[5] If, in a suit for dower, the fact of marriage is denied, it must be strictly proved.[6] But as a general rule, a marriage valid where solemnized will be valid everywhere;[7] and the widow is entitled to dower, although the marriage is consummated abroad, where the common law is not in force.[8] In the United States, the fact of marriage is tried by jury, like other issues of fact.[9]

1 1 Greenl. Cruise, 154; Stevens *v.* Smith, 4 Marsh. J. J. 64; 20 Am. Dec. 205.

2 Denton *v.* Nanny, 8 Barb. 618.

3 Co. Litt. 33 *a*.

4 See 2 Blackst. Com. 130; Higgins v. Breen, 9 Mo. 497; Jenkins v. Jenkins, 2 Dana, 102; Smart v. Whaley, 6 Smedes & M. 308.

5 1 Greenl. Cruise, 154.

6 Jones v. Jones, 28 Ark. 19. As to the presumption of marriage arising from cohabitation: see Carter v. Parker, 28 Me. 509; Conert v. Hertzog, 4 Pa. St. 145; Weatherford v. Weatherford, 20 Ala. 548; Yardley's Estate, 72 Pa. St. 207.

7 Clark v. Clark, 8 Cush. 385; Sutton v. Warren, 10 Met. 451; Hutchins v. Kimmell, 31 Mich. 126; 18 Am. Rep. 164; Fenton v. Livingstone, 3 Macq. 497. Compare Greenwood v. Curtis, 6 Mass. 378; State v. Ross, 76 N. C. 242.

8 Moore v. Mayor etc. 8 N. Y. 110; Ilderton v. Ilderton, Black. H. 145.

9 See 1 Greenl. Cruise, 154, note; Jones v. Jones, 28 Ark. 19. General reputation, cohabitation, and acknowledgment are sufficient evidence of marriage in cases of dower: Sellman v. Bowen, 8 Gill & J. 50; 29 Am. Dec. 524; Boone v. Purnell, 28 Md. 628.

§ 56. Seizin of husband.—To entitle a widow to dower, the husband must have been seized of the estate at some time during coverture.[1] But a seizin in law will be sufficient;[2] as where the ancestor dies seized, and the heir, being married, dies without making an actual entry on the lands, his widow is nevertheless entitled to dower.[3] Nor does the law require any particular length of time during which the husband should retain seizin;[4] although momentary, if for his benefit, it is sufficient to give dower.[5] It is otherwise, however, if the seizin be merely instantaneous, and the husband, by the same act or by the same conveyance by which he acquires the seizin, parts with it.[6] Thus, if he takes a conveyance of land and gives back a mortgage for the purchase-money, the wife is not entitled to dower therein.[7] And this is so although the mortgage is not made to his grantor, but to a third person, provided the whole is one transaction.[8] And where a husband purchased lands, giving his note as security for the purchase-price, and afterward by his sole deed reconveyed the lands to the vendor in satisfaction of the note, the wife's right of dower was held not to attach.[9] If a man before marriage makes a conveyance of lands, his widow is not entitled to dower therein, although the deed was unrecorded at the time of the marriage.[10] Nor is a widow entitled to dower in lands conveyed by her hus-

band before marriage, although the conveyance was fraudulent and void as against creditors.[11] But where land was conveyed to a husband, and the deed was afterward destroyed by his direction, before beinh recorded, the widow was held to be entitled to dower in the land so conveyed.[12] The wife is entitled to dower although the husband aliens the land on the day of his marriage.[13] And it has been held that, if a husband immediately before marriage should make a conveyance of his lands, unknown to his wife, and for the purpose of defeating her right of dower, which fact was known to the grantee, it will be no bar to her right.[14] No title to dower, at common law, attaches on a joint seizin;[15] the mere possibility of the estate being defeated by survivorship prevents dower.[16] But the rule is otherwise in those States where, by statute, the *jus accrescendi* is abolished.[17] And the widows of tenants in common are entitled to dower in virtue of the seizins of their husbands.[18]

1 Butler *v.* Cheatham, 8 Bush, 594; Poor *v.* Horton, 15 Barb. 485; Leach *v.* Leach, 21 Hun, 381; Atwood *v.* Atwood, 22 Pick. 283; Galbraith *v.* Greene, 13 Serg. & R. 85; Durando *v.* Durando, 23 N. Y. 331; and he must have been seized of a present freehold interest: Pretts *v.* Richey, 29 Pa. St. 71.

2 Co. Litt. 31 *a*; Stevens *v.* Smith, 4 Marsh. J. J. 64; 20 Am. Dec. 205; Mann *v.* Edson, 39 Me. 25; Welch *v.* Buckins, 9 Ohio St. 331; Atwood *v.* Atwood, 22 Pick. 283; Denis *v.* Denis, 7 Blackf. 572. Compare Henry's Case, 4 Cush. 257; Weir *v.* Tate, 4 Ired. Eq. 264; Torrence *v.* Carbry, 27 Miss. 697; Foxworth *v.* White, 5 Strob. 113; Thomas *v.* Thomas, 10 Ired. 133.

3 1 Greenl. Cruise, 156; and see Dunham *v.* Osborne, 1 Paige, 635; Galbraith *v.* Greene, 13 Serg. & R. 85. Under the English Statute the widow may now claim dower when the husband has had only a right of entry or action: Stat. 3 and 4 Wm. c. 105, §§ 2, 3.

4 Broughton *v.* Randall, Cro. Eliz. 503; Stanwood *v.* Dunning, 14 Me. 290; Gage *v.* Ward, 25 Me. 101; Douglass *v.* Dickson, 11 Rich. 417.

5 Rawlings *v.* Lowndes, 34 Md. 639; McClure *v.* Harris, 12 Mon. B. 261; Smith *v.* McCarty, 119 Mass. 519; Sutherland *v.* Sutherland, 69 Ill. 481; McCauley *v.* Grimes, 2 Gill. & J. 324.

6 Holbrook *v.* Finney, 4 Mass. 566; 3 Am. Dec. 243; Gully *v.* Ray, 18 Mon. B. 107; Gilliam *v.* Moore, 4 Leigh, 30; 24 Am. Dec. 704; Slaughter *v.* Culpepper, 44 Ga. 319; Fontaine *v.* Boatmen's Sav. Inst. 57 Mo. 552; Reed *v.* Morrison, 12 Serg. & R. 18; Stow *v.* Tifft, 15 Johns. 459; 8 Am. Dec. 266.

7 Cunningham *v.* Knight, 1 Barb. 399; Moore *v.* Rollins, 45 Me. 493; Heinsler *v.* Nickum, 38 Md. 277; Pendleton *v.* Pomeroy, 4 Allen, 510.

8 King *v.* Stetson, 11 Allen, 407; Clark *v.* Munroe, 14 Mass. 351; and see McClure *v.* Harris, 12 Mon. B. 261; Kittle *v.* Van Dyck, 1 Sand. Ch.

76; Grant v. Dodge, 43 Me. 489. But compare Gammon v. Freeman, 31 Me. 243; Mills v. Van Voorhis, 23 Barb. 135.

9 Hugunin v. Cochrane, 51 Ill. 302; 2 Am. Rep. 303.

10 Blood v. Blood, 23 Pick. 80.

11 Whithed v. Mallory, 4 Cush. 138.

12 Johnston v. Miller, 40 Ind. 376; 17 Am. Rep. 699.

13 Stewart v. Stewart, 3 Marsh. J. J. 48.

14 Brewer v. Connel, 11 Humph. 500; Babcock v. Babcock, 43 How. Pr. 97; Petty v. Petty, 4 Mon. B. 215; Swaine v. Perine, 5 Johns. Ch. 489; Youngs v. Carter, 10 Hun, 194; Cranson v. Cranson, 4 Mich. 220; Killinger v. Reidenhauer, 6 Serg. & R. 531; Pomeroy v. Pomeroy, 54 How. Pr. 228. But compare Jenny v. Jenny, 24 Vt. 324; Baker v. Chase, 6 Hill, 482.

15 Mayburry v. Brien, 15 Peters, 21; Co. Litt. 30.

16 Mayburry v. Brien, 15 Peters, 21.

17 See Tabbe v. Wiseman, 2 Ohio St. 207; Weir v. Tate, 4 Ired. Eq. 264; Walker v. Walker, 6 Coldw. 571; Davis v. Logan, 9 Dana, 186; Holbrook v. Finney, 4 Mass. 566.

18 Hudson v. Steere, 9 R. I. 106; Mosher v. Mosher, 32 Me. 412; Smith v. Smith, 6 Lans. 313; Potter v. Wheeler, 13 Mass. 504; Sutton v. Rolf, 3 Lev. 84.

§ 57. Death of husband.—By the natural death of the husband, the wife's right of dower becomes consummate.[1] During the life of the husband this right is merely inchoate,[2] and is subject to be modified, changed, or even abolished by legislative enactment.[3] But, as between a wife and any other than the State, or its delegates or agents exercising the right of eminent domain, an inchoate right of dower in lands is a subsisting and valuable interest which will be protected and preserved to her.[4] The death of the husband may be presumed from continued absence without being heard from;[5] and reputation in the family is *prima facie* evidence of his death.[6] So, in general, is the granting of letters of administration.[7] It has generally been said that the mere *civil* death of a man did not give his wife a right to dower.[8]

1 Sutliff v. Forgey, 1 Cowen, 89; Riddick v. Walsh, 15 Mo. 519; Wheatley v. Calhoun, 12 Leigh, 264.

2 Moore v. Mayor etc. 4 Sand. 456; 8 N. Y. 110; Walt v. Walt, 4 N. Y. 96.

3 Barbour v. Barbour, 46 Me. 9.

4 Simar v. Canaday, 53 N. Y. 298; 13 Am. Rep. 523; and see § 53, *ante*.

5 Foulks v. Rhea, 7 Bush, 568; Woods v. Woods, 2 Bay, 476.

6 Cochrane *v.* Libby, 17 Me. 39.

7 Newman *v.* Jenkins, 10 Pick. 515; Moors *v.* De Bervales, 1 Russ. 300.

8 See 1 Greenl. Cruise, 158; 2 Crabb Real Prop. 131; Woolridge *v.* Lucas, 7 Mon. B. 49.

§ 58. Effect of divorce.—A divorce *a vinculo matrimonii* bars the right to dower, for the reason that, at common law, the party claiming dower must have been the wife of the husband at the time of his death.[1] But in those States where such divorce is authorized by statute, provision is made for preserving the dower right of the wife, unless the divorce be granted for her misconduct.[2] A divorce *a mensa et thoro*, at common law, does not alter the relation of the parties, and is not, therefore, a bar of dower.[3]

1 McCraney *v.* McCraney, 5 Iowa, 232; Dobson *v.* Butler, 17 Miss. 87; Whitsell *v.* Mills, 6 Ind. 229; Burdick *v.* Briggs, 11 Wis. 126; Miltimore *v.* Miltimore, 40 Pa. St. 151; Rice *v.* Lumley, 10 Ohio St. 596.

2 See Schiffer *v.* Pruden, 64 N. Y. 47; Forest *v.* Forest, 6 Duer. 102; McCafferty *v.* McCafferty, 8 Blackf. 218; Davol *v.* Howland, 14 Mass. 219; Gleason *v.* Emerson, 51 N. H. 405; Gould *v.* Crow, 57 Mo. 200; Calame *v.* Calame, 24 N. J. Eq. 440; Lakin *v.* Lakin, 2 Allen, 45; Wait *v.* Wait, 4 N. Y. 25; Kade *v.* Lauber, 16 Abb. Pr. N. S. 288; 43 How. Pr. 382; Young *v.* Gregory, 49 Me. 475.

3 Clark *v.* Clark, 6 Watts & S. 85; Crain *v.* Cavana, 36 Barb. 410; Dean *v.* Richmond, 5 Pick. 461; Gee *v.* Thompson, 11 La. An. 657; and see Watkins *v.* Watkins, 7 Yerg. 283; Walsh *v.* Kelly, 34 Pa. St. 84; Thayer *v.* Thayer, 14 Vt. 107; Bryan *v.* Bachseller, 6 R. I. 546; Seagrave *v.* Seagrave, 13 Ves. 443.

§ 59. Elopement, etc.—At common law, adultery was no bar of dower;[1] and by the statute of Westminster 11,[2] elopement or departure of the wife willingly from her husband, as well as adultery, is necessary to make the bar complete.[3] This statute has been re-enacted in substance in some of the States,[4] and is understood to be a part of the American common law, where no such re-enactment has in terms been made.[5] But in a few of the States, elopement with an adulterer is not a bar to dower, unless followed by a divorce.[6] Mere separation of husband and wife, however unjustifiable, without adultery, will not bar dower;[7] but it is otherwise if, after such separation, the wife voluntarily commits adultery.[8] And

if she is compelled to leave her husband, but refuses to return when he offers to take her back, and she afterwards lives in adultery, she is barred of dower.[9] And it has been held that her adultery, without reconciliation, bars her dower, although she originally departed from her husband's house in consequence of his cruelty.[10] But it is the better opinion that it must appear that the wife *willingly* left her husband; and if driven away by him, or by his compulsion, she does not forfeit her dower.[11] Where, in the absence of the husband, a wife commits adultery at home, it is held not to bar her claim to dower.[12] On the other hand, the statute was thought to be satisfied by an open state of adultery, whether the woman resided in the same house with her adulterer or in separate houses; whether in her own or a friend's house, or in his; whether with or without the ceremony of marriage.[13]

1 See Reynolds *v.* Reynolds, 24 Wend. 193; Bell *v.* Nealy, 1 Bail. 312; 19 Am. Dec. 686; Elder *v.* Reel, 62 Pa. St. 308; 1 Am. Rep. 414.

2 13 Edw. I, ch. 34. See Hethrington *v.* Graham, 6 Bing. 135.

3 Elder *v.* Reel, 62 Pa. St. 308; 1 Am. Rep. 414; Govier *v.* Hancock, 6 Term Rep. 603.

4 See Walters *v.* Jordon, 13 Ired. 361; Stegall *v.* Stegall, 2 Brock. 256.

5 4 Kent Com. 53; Bell *v.* Nealy, 1 Bail. 312; 19 Am. Dec. 686.

6 Schiffer *v.* Pruden, 64 N. Y. 47; Reynolds *v.* Reynolds, 24 Wend. 193; Bryem *v.* Bachgller, 6 R. I. 543; Lakin *v.* Lakin, 2 Allen, 45.

7 Wiseman *v.* Wiseman, 73 Ind. 112; 38 Am. Rep. 115; Thayer *v.* Thayer, 14 Vt. 107; and see § 58, *ante*.

8 Cogswell *v.* Tibbetts, 3 N. H. 41; Elder *v.* Reel, 62 Pa. St. 308; 38 Am. Rep. 414.

9 Bell *v.* Nealy, 1 Bail. 312; 19 Am. Dec. 686.

10 Woodward *v.* Dowse, 10 Com. B. N. S. 722.

11 Walters *v.* Jordon, 13 Ired. 361; Elder *v.* Reel, 62 Pa. St. 308; 1 Am. Rep. 414; Hethe.ington *v.* Graham, 6 Bing. 135; 19 Eng. C. L. 31; and see Shaffer *v.* Richardson, 27 Ind. 122.

12 Cogswell *v.* Tibbetts, 3 N. H. 41.

13 Stegall *v.* Stegall, 2 Brock. 256.

§ 60. Alienage.—At common law, an alien cannot hold real estate,[1] and alien women are not therefore capable of acquiring dower.[2] But by an early statute, an exception was made in favor of aliens married to English-

men by license from the king.[3] And by a recent English statute, all women aliens married to any natural-born subjects or persons naturalized are entitled to the rights of natural-born subjects.[4] So it will be found that, by statute in the various States, alienage is no longer an impediment to the wife's dower.[5] And by provision of act of Congress, the widow of a citizen of the United States, whether native or naturalized, is entitled to dower in her husband's land, irrespective of the nativity of the widow.[6]

1 See § 19, *ante*.

2 1 Greenl. Cruise, 159; 2 Blackst. Com. 131; Sistare *v.* Sistare, 2 Root, 468; Mick *v.* Mick, 10 Wend. 379; Sewall *v.* Lee, 9 Mass. 363; Cong. Church *v.* Morris, 8 Ala. 182.

3 Co. Litt. 31 *b*; 1 Greenl. Cruise, 159.

4 Stat. 7 and 8 Vict. ch. 66.

5 See Greer *v.* Sankston, 26 How. Pr. 471; Luhrs *v.* Elmer, 80 N. Y. 171; Whitnig *v.* Stevens, 4 Conn. 44; Buchanan *v.* Deshon, 1 Har. & G. 280; Moore *v.* Tisdale, 5 Mon. B. 352; Stokes *v.* Fallon, 2 Mo. 32; Stemple *v.* Herminghouser, 3 Iowa, 408. Under the California statute, no estate is allowed to the husband as tenant by the courtesy, nor any estate in dower to the wife. But upon the death of either, the survivor takes one-half of the common property of the deceased; and if there are no descendants, the whole goes to the survivor: Beard *v.* Knox, 5 Cal. 252. See Cal. Civ. Code, § 173.

6 10 U. S. Stat. at Large, 604; U. S. Rev. Stat. § 1994; and see Luhrs *v.* Elmer, 80 N. Y. 171; Burton *v.* Burton, 26 How. Pr. 474; 38 N. Y. 373; Kelly *v.* Owen, 7 Wall. 496.

§ 61. In what things dower may be had.—A woman is dowable not only in lands themselves, but also in all incorporeal hereditaments that savor of the realty.[1] And as a general rule in this country, she is dowable in all the lands of the husband, whether in a state of nature or improved.[2] A widow is entitled to dower in all mines opened and worked by her husband during the coverture,[3] or by the heir before dower is assigned.[4] But newly opening a mine is waste, and the widow, having only an estate for life, can legally do no act which injures the inheritance.[5] She may, however, take coal to any extent from a mine already opened, or sink new shafts into the same veins, or penetrate through a seam already opened, and dig into one lying under it.[6] And she may construct new approaches to mines already opened.[7] In

North Carolina, she may use trees boxed for turpentine in the life-time of her husband, or box new ones, not increasing the amount beyond that obtained when dower was assigned.[8] And she is entitled to the benefit of improvements made upon the land by the heir, after the husband's death, and before assignment of dower.[9] But, as a general rule, if the improvements were made by a purchaser of the land from the husband, dower should be estimated according to the value of the land at the time of alienation, and not at the time of the death of the husband.[10] Wheat growing upon land set off to a widow as her dower belongs to her, and not to the heirs of her husband.[11] And where, as in Kentucky, stock in a railroad company is held to be real estate, it is subject to the widow's right of dower.[12] Where insured buildings standing on lands in which a widow has a dower right are burned, she is entitled to her portion of the insurance money.[13] It is very generally held in this country that the dower rights of widows extend to equities of redemption;[14] and if a deed be absolute on its face, but is in fact a mortgage, the widow of the grantor is entitled to dower in the premises so conveyed.[15] A woman is dowable in base or qualified fees;[16] and dower is an incident inseparably annexed to an estate tail.[17]

1 Gorham *v.* Daniels, 23 Vt. 611; Buckridge *v.* Ingram, 2 Ves. Jr. 652, 664; Chase's Case, 1 Bland Ch. 206; 17 Am. Dec. 277; Hudson *v.* Steere, 9 R. I. 106. See Leach *v.* Leach, 21 Hun, 381.

2 Walker *v.* Schuyler, 10 Wend. 480; Allen *v.* McCoy, 8 Ohio, 418; Schnebly *v.* Schnebly, 26 Ill. 116; Findlay *v.* Smith, 6 Munf. 134; Chapman *v.* Shroeder, 10 Ga. 321. In a few of the States, wild and uncultivated lands are excluded from the operation of dower: see White *v.* Willis, 7 Pick. 143; Johnson *v.* Perley, 2 N. H. 56; Stevens *v.* Owen, 25 Me. 94; Shattuck *v.* Gregg, 23 Pick. 88.

3 Moore *v.* Robbins, 45 Me. 493; Billings *v.* Taylor, 10 Pick. 460; Stoughton *v.* Leigh, 1 Taunt. 402; Quarrington *v.* Arthur, 10 Mees. & W. 335.

4 Lenfers *v.* Henke, 73 Ill. 405; 24 Am. Rep. 263.

5 Coates *v.* Cheever, 1 Cowen, 460.

6 Crouch *v.* Puryear, 1 Rand. 258; 10 Am. Dec. 528.

7 Coates *v.* Cheever, 1 Cowen, 460.

8 Carr *v.* Carr, 4 Dev. & B. 179.

9 Parker *v.* Parker, 17 Pick. 236.

10 Dibble v. Clapp, 31 How. Pr. 420; Tod v. Baylor, 4 Leigh, 493. Compare Mosher v. Mosher, 15 Me. 371; Thompson v. Morrow, 5 Serg. & R. 289; 9 Am. Dec. 353; Dunseth v. Bank of U. S. 6 Ohio, 76; Lawson v. Morton, 6 Dana, 471; Thompson v. Morrow, 5 Serg. & R. 289; Doe v. Gwinnell, 1 Q. B. 682; 41 Eng. C. L. 728; Boyd v. Carlton, 69 Me. 200; 31 Am. Rep. 268.

11 Ralston v. Ralston, 3 Iowa, 533.

12 Copeland v. Copeland, 7 Bush. 349; Price v. Price, 6 Dana, 107; but see Johns v. Johns, 1 McCook, 350; McDonough v. Hepburn, 5 Fla. 508. A widow is not dowable of land taken by the right of eminent domain for a railroad: French v. Lord, 69 Me. 537.

13 Campbell v. Murphy, 2 Jones' Eq. 357.

14 Fish v. Fish, 1 Conn. 559; Moore v. Rollins, 45 Me. 493; Daniel v. Leitch, 13 Gratt. 195; Van Duyne v. Thayer, 14 Wend. 233; Snyder v. Snyder, 6 Mich. 470; Henegan v. Harllee, 10 Rich. Eq. 285; Titus v. Neilson, 5 Johns. Ch. 452; Nills v. Van Voorhis, 23 Barb. 125; 20 N. Y. 412; Taylor v. McCracken, 2 Blackf. 262; Harrow v. Johnson, 3 Met. (Ky.) 578; and see Bell v. Mayor etc. 10 Paige, 49; Barbour v. Barbour, 46 Me. 8. By the common law, dower does not attach to an equity of redemption: Dixon v. Saville, 1 Brown Ch. 326; Mayburry v. Brien, 15 Peters, 21; Cheek v. Waldrum, 25 Ala. 152; McIver v. Cherry, 8 Humph. 517.

15 Turbeville v. Gibson, 5 Heisk. 395.

16 1 Greenl. Cruise, 162; Buckridge v. Ingram, 2 Ves. Jr. 652, 664; House v. Jackson, 50 N. Y. 161.

17 Low v. Burrow, 3 P. Wms. 263; 1 Greenl. Cruise, 162.

§ 62. What things not liable to.—A widow is not dowable of a vested remainder in fee limited on a precedent estate for life, nor in an estate in reversion expectant upon an estate of freehold.[1] And this rule applies as well where the estate of the husband comes by devise as by inheritance.[2] She is, however, dowable of a reversion expectant on a term for years, because the husband is seized of the freehold.[3] And where one makes a lease for years, reserving rent before his marriage, his widow is entitled to dower in the reversion and in the rent, immediately from her husband's death.[4] A widow is not dowable of a mere annuity granted to the husband and his heirs;[5] nor is she dowable of lands assigned to another woman in dower;[6] and it seems that there can be no dower in real estate held as partnership assets.[7] A widow is not entitled to dower of a trust estate at common law;[8] and she never was allowed dower of a use.[9] But where the legal and equitable estates are equal and co-extensive, the equitable merges in the legal estate, and

the widow will be entitled to dower.[10] And under statutory enactments in many of the States, dower is allowed in all equitable estates, where the equity of the husband is perfect and complete.[11] By the rule of the common law, if the husband exchanges his lands for others, his widow may elect to be endowed in either of the estates, but she cannot claim dower in both.[12] An "exchange," in the legal acceptation of the term, is understood to be "a mutual grant of equal interests, the one in consideration of the other";[13] and where the interests are unequal, the case will be regarded as within the ordinary transfers of real estate, and dower will attach to the land conveyed, and also to the land received in exchange.[14] Dower does not attach to lands appropriated to public uses.[15] And a widow is not entitled to dower in grass, fruits, and other spontaneous productions of the soil growing on the lands of the husband at the time of his death.[16] A woman divorced *a vinculo matrimonii*, on the ground of the adultery of the husband, is not entitled to dower in lands of which he became seized after and of which he was not seized before the divorce.[17]

1 Green *v.* Putnam, 1 Barb. 500; Dunham *v.* Osborne, 1 Paige, 634; Weir *v.* Humphreys, 4 Ired. Eq. 273; Robinson *v.* Codman, 1 Sum. 130; Otis *v.* Parshley, 10 N. H. 403; Eldridge *v.* Forrestal, 7 Mass. 253.

2 Durando *v.* Durando, 32 Barb. 529; 23 N. Y. 331.

3 1 Greenl. Cruise, 162; Bates *v.* Bates, 1 Raym. Ld. 326.

4 Chase's Case, 1 Bland Ch. 206; 17 Am. Dec. 277. Compare Williams *v.* Cox, 3 Edw. Ch. 173; Darcey *v.* Blake, 2 Schoales & L. 387.

5 Aubin *v.* Daly, 4 Barn. & Ald. 63; Earl of Stafford *v.* Buckley, 2 Ves. Sr. 170.

6 1 Greenl. Cruise, 164. Compare Manning *v.* Laboree, 33 Me. 343; Elwood *v.* Klock, 13 Barb. 50; Atwood *v.* Atwood, 22 Pick. 283; Bear *v.* Snyder, 11 Wend. 592.

7 Hiscock *v.* Jaycox, 12 Bank. Reg. 507; Willet *v.* Brown, 65 Mo. 138; 27 Am. Rep. 265; and see Hoxie *v.* Carr, 1 Sum. 173; Duhring *v.* Duhring, 20 Mo. 174; Loubat *v.* Nourse, 5 Fla. 350; Dyer *v.* Clark, 5 Met. 562; Ripley *v.* Waterworth, 7 Ves. 425; Houghton *v.* Houghton, 11 Sim. 491; Fairchild *v.* Fairchild, 64 N. Y. 471.

8 Powell *v.* Monson, 3 Mason, 364; Cowman *v.* Hall, 3 Gill & J. 398; Firestone *v.* Firestone, 2 Ohio St. 415; Small *v.* Proctor, 15 Mass. 495; Edmondson *v.* Welsh, 27 Ala. 578; Stevens *v.* Smith, 4 Marsh. J. J. 64; 20 Am. Dec. 205. But it has been held otherwise in Pennsylvania: Shoemaker *v.* Walker, 2 Serg. & R. 556.

9 1 Greenl. Cruise, 164.

10 Tulley *v.* Alston, 3 Ves. 339; Dean *v.* Mitchell, 4 Marsh. J. J. 451.

Hopkinson v. Dumas, 42 N. H. 296; Coster v. Clarke, 3 Edw. Ch. 428; Knight v. Knight, 4 Beav. 10.

11 See Robinson v. Miller, 1 Mon. B. 93; Heed v. Ford, 16 Mon. B. 114; Gillespie v. Somerville, 3 Stewt. & P. 447; Hawley v. James, 5 Paige, 318; Lobdell v. Hayes, 4 Allen, 187; Rands v. Kendall, 15 Ohio, 671; Pritts v. Richey, 29 Pa. St. 71; Barnes v. Gay, 7 Iowa, 26; Newhall v. Lynn etc. Sav. Bank, 101 Mass. 428; Am. Rep. 367.

12 Co. Litt. 31 b; 1 Greenl. Cruise, 163; Butler's Case, 3 Leon. 271.

13 2 Blackst. Com. 223. See Wilcox v. Randall, 7 Barb. 633.

14 Cass v. Thompson, 1 N. H. 65; 8 Am. Dec. 36; Wilcox v. Randall, 7 Barb, 633; Mosher v. Mosher, 32 Me. 412; Stevens v. Smith, 4 Marsh. J. J. 64; 20 Am. Dec. 205.

15 Gwynne v. Cincinnati, 3 Ohio, 24; French v. Lord, 69 Me. 537; and see Giles v. Gullim, 13 Ind. 487; Moore v. Mayor etc. 8 N. Y. 110; Weaver v. Gregg, 6 Ohio St. 547. The purchase by a railway company of land without the limits of its road, necessary for depot and station purposes, does not extinguish an existing inchoate right of dower therein: Nye v. Taunton Branch R. R. 113 Mass. 277.

16 Kain v. Fisher, 6 N. Y. 597. Compare Ralston v. Ralston, 3 Iowa, 533.

17 Kade v. Lauber, 16 Abb. Pr. N. S. 287; 48 How. Pr. 382.

§ 63. Widow's right of election.—It is already seen[1] that, at common law, in case of an exchange of lands by the husband, his widow must elect to be endowed, either of the lands given, or of those taken in exchange.[2] Another instance of election is where a testamentary provision is made for the widow, which is intended to be in lieu of dower, in which case she may elect between the provision in the will or her dower, but cannot have both.[3] And it is immaterial whether the property given by will consists of real or personal property.[4] But in order to compel the widow to elect between dower and a testamentary provision, where the testator has not in terms declared his intention that she shall be confined to one, the other provisions of the will must be totally inconsistent with the claim of dower.[5] An election may be evidenced by acts *in pais*,[6] as well as by matter of record.[7] By statute, in some of the States, the election must be made within a prescribed time after the testator's death;[8] or if not prescribed, within a reasonable time.[9] And where a widow has fairly elected to take a testamentary provision in lieu of dower, she will not afterwards be permitted to revoke it and claim dower.[10]

In Pennsylvania, the committee of a lunatic widow cannot make an election for her between a testamentary provision by her husband and her dower at common law, without the sanction of the court.[11]

1 § 62, *ante*.

2 See Wilcox *v.* Randall, 7 Barb. 633.

3 Pemberton *v.* Pemberton, 29 Mo. 408; Chapin *v.* Hill, 1 R. I. 446; Mills *v.* Mills, 28 Barb. 454; Hoover *v.* Landis, 76 Pa. St. 354; Raines *v* Corbin, 24 Ga. 185. A widow's right of election is a personal one, and not transmissible by descent: Welch *v.* Anderson, 28 Mo. 293; Boone *v.* Boone, 3 Har. & McH. 93.

4 Gosling *v.* Warburton, Cro. Eliz. 128; Trueman *v.* Waters, 4 Dane Abr. 676; Norris *v.* Clark, 10 N. J. Eq. 51; Kennedy *v.* Mills, 13 Wend. 553

5 Higginbotham *v.* Cornwell, 8 Gratt. 83; Church *v.* Bull, 2 Denio 430; Bond *v.* McNiff, 6 Jones & S. 83; Vernon *v.* Vernon, 53 N. Y. 351; Ailing *v.* Chatfield, 42 Conn. 276; Hall *v.* Hall, 8 Rich. 407; Adsit *v.* Adsit, 2 Johns. Ch. 448; Metteer *v.* Wiley, 34 Iowa, 214; Incledon *v.* Northcote, 3 Atk. 437; Stewart *v.* Stewart, 31 N. J. Eq. 408.

6 Delay *v.* Vinal, 1 Met. 57; Watson *v.* Watson, 28 Mo. 300; Tooke *v.* Hardeman, 7 Ga. 20; and see Farron *v.* Farron, 1 Del. Ch. 457; Nelson *v.* Hally, 50 Ala. 3; Caston *v.* Caston, 2 Rich. Eq. 1.

7 See Palmer *v.* Voorhis, 35 Barb. 479; Hawley *v.* James, 5 Paige 318; McCallister *v.* Brand, 11 Mon. B. 370. As a general rule, the widow will be understood to accept the testamentary provision in her favor, unless she expressly declare a contrary determination: Pratt *v.* Felton, 4 Cush. 174; and see Thompson *v.* Hoop, 6 Ohio St. 480; Merrill *v.* Emery, 10 Pick. 507. In some of the States, where a testator makes a provision for his wife, it will be presumed to be in lieu of dower, unless the contrary appears to be the intention of the will: Apperson *v.* Bolton, 29 Ark. 418; Reed *v.* Dickerman, 12 Pick. 146; Collins *v.* Carman, 5 Md. 504; Welch *v.* Anderson, 28 Miss. 293; Herbert *v.* Wren, 7 Cranch, 378.

8 See Smith *v.* Smith, 20 Vt. 270; Armstrong *v.* Baker, 9 Ired. 109; Hastings *v.* Clifford, 32 Me. 132; Malone *v.* Majors, 8 Humph. 577; Crow *v.* Powers, 19 Ark. 424; Mills *v.* Mills, 28 Barb. 454.

9 Hilliard *v.* Binford, 10 Ala. 996.

10 Davison *v.* Davison, 15 N. J. L. 235; Hall's Case, 1 Bland Ch. 203; 17 Am. Dec. 275. But compare Camden Mutual Ins. Co. *v.* Jones, 23 N. J. Eq. 171; Chew *v.* Farmers' Bank, 9 Gill, 361; Dabney *v.* Bailey, 42 Ga. 521; Hastings *v.* Clifford, 32 Me. 132; Richart *v.* Richart, 30 Iowa, 465.

11 Kennedy *v.* Johnston, 65 Pa. St. 451; 3 Am. Rep. 650. See Brown *v.* Hodgdon, 31 Me. 65.

§ 64. How barred.—Several of the circumstances which may bar or defeat dower, as alienage, elopement, divorce, etc., have been noticed in preceding sections.[1] Another cause of the loss of dower at common law, known as "detinue of charters," is where the widow detains the title deeds or evidences of the estate from the heir;[2] in which case, the heir may raise a bar to the recovery of

her dower, until she restores them.[3] If a woman joined with her husband in levying a fine or suffering a common recovery, the effect was to bar herself of dower.[4] But fines and recoveries are abolished by statute in England;[5] and wives may now convey their estates by deed, executed jointly with their husbands, and acknowledged in the mode required by statute.[6]

1 See §§ 58, 59, 60, *ante*.

2 2 Blackst. Com. 136.

3 1 Greenl. Cruise, 176, 177; Burdon *v.* Burdon, 1 Salk. 252; Ann Bedingfield's Case, 9 Rep. 17 *b*.

4 1 Greenl. Cruise, 177; 2 Blackst. Com. 137.

5 Stat. 3 and 4 Wm. 4, c. 74.

6 Wms. Real Prop. 189. Fines and recoveries are also out of use in this country: see Powell *v.* Monson, 3 Mason, 347; Chase's Case, 1 Bland Ch. 229; §§ 30, 32, *ante*.

§ 65. Forfeiture for crime.—By the common law, if a man was attainted of treason or felony, his widow was thereby barred of her dower.[1] But this principle was not adopted into the law of this country; and even our acts of confiscation save the right of dower to the wife of the person attainted.[2]

1 2 Blackst. Com. 131; 1 Greenl. Cruise, 173.

2 See Scwall *v.* Lee, 9 Mass. 363; Palmer *v.* Horton, 1 Johns. Cas. 27; Cozens *v.* Long, 2 Pen. (N. J.) 559.

§ 66. How barred by deed.—The usual mode of barring dower in this country, by the voluntary act of the wife, has always been by her joining with her husband in a deed of conveyance of the land properly acknowledged.[1] And in all cases, when the wife unites with her husband in a conveyance properly executed by her, which is effectual and operative against her husband, and which is not superseded or set aside as against him or his grantee, her right of dower is forever barred and extinguished for all purposes and as to all persons.[2] This mode of barring dower is said to be a substitute for fine and recovery, and the provisions of the statute must be substantially pursued.[3] In order to operate as a bar, the

wife must have been of age when she executed the deed;[4] and, in most of the States, if the deed does not contain apt words showing her intention to relinquish dower, she will not be barred.[5] Nor can the right be released by parol;[6] and an instrument purporting to release dower and signed by the widow, but not sealed or acknowledged, will not bar her claim.[7] In many of the States the deed must be separately acknowledged by the wife, apart from her husband, after a private examination by the officer authorized to take her acknowledgment;[8] and the provisions of the statute in this respect must be strictly pursued, or the act of relinquishment will be void.[9] The certificate of acknowledgment is, however, conclusive as to the facts therein stated;[10] and may not be impeached, except for fraud, collusion, or imposition.[11] A release to the husband by the wife during coverture will not bar her dower.[12] Nor is a quitclaim or release by the wife to a stranger to the title effectual to divest her of an inchoate right of dower;[13] and a contract before coverture not to claim dower has been held no bar.[14] An inchoate right of dower is not the subject of a conveyance in any of the usual forms by which real property is transferred, and the law will not effect, indirectly or by way of estoppel, what cannot be accomplished by contract and the ordinary forms of conveyance.[15]

1 Powell *v.* Monson etc. Co. 3 Mason, 347; Fowler *v.* Shearer, 7 Mass. 14; Lufkin *v.* Curtis, 13 Mass. 223; Williams *v.* Robson, 6 Ohio St. 514; French *v.* Peters, 33 Me. 396; Elmendorf *v.* Lockwood, 57 N. Y. 322.

2 Elmendorf *v.* Lockwood, 57 N. Y. 322; Malloney *v.* Horan, 49 N. Y. 111; 10 Am. Rep. 335; White *v.* Graves, 107 Mass. 325; 9 Am. Rep. 38; Richardson *v.* Wyman, 62 Me. 280; 16 Am. Rep. 459; Morton *v.* Noble, 57 Ill. 176; 11 Am. Rep. 7; Ridgway *v.* Masting, 23 Ohio St. 294; 13 Am. Rep. 251; Den *v.* Johnson, 3 Har. (N. J.) 87. Compare Robinson *v.* Bates, 3 Met. 40; Pinson *v.* Williams, 23 Miss. 64; Woodworth *v.* Paige, 5 Ohio St. 70.

3 O'Farrall *v.* Simplot, 4 Iowa, 381; and see Powell *v.* Monson etc. Co. 3 Mason, 347.

4 Cunningham *v.* Knight, 1 Barb. 399; Hughes *v.* Watson, 10 Ohio, 127; Jones *v.* Todd, 2 Marsh. J. J. 359.

5 Stevens *v.* Owen, 25 Me. 94; Davis *v.* Bartholomew, 3 Ind. 485; Leavitt *v.* Lamprey, 13 Pick. 383; Thomas *v.* Gomel, 6 Leigh, 9. In

New Hampshine, a wife may bar her dower without apt words of release: Dustin v. Steele, 7 Fost. 431.

6 Worthington v. Middleton, 6 Dana, 300; Keeler v. Tatnell, 23 N. J. L. 62.

7 Giles v. Moore, 4 Gray, 600; and see Manning v. Laboree, 33 Me. 343; French v. Peters, 33 Me. 336.

8 See Shaller v. Brand, 6 Binn. 435; Thompson v. Morrow, 5 Serg. & R. 289; 9 Am. Dec. 358; Elliot v. Piersol, 1 McLean, 11; Barnet v. Barnet, 15 Serg. & R. 72; Brown v. Farran, 3 Ohio, 15; Dundas v. Hitchcock, 12 How. 256. In some of the States, as Connecticut, New Hampshire, Maine, and Massachusetts, a separate acknowledgment by the wife is not required: see 1 Wash. Real Prop. 202*; Durant v. Ritchie, 4 Mason, 45; 1 Am. Jur. 74. And it is no longer requisite in New York: Laws of 1880, ch. 300.

9 Clarke v. Redman, 1 Blackf. 379; Jordon v. Corey, 2 Blackf. 385; Webster v. Hall, 2 Har. & McH. 19; 1 Am. Dec. 370; Drury v. Foster, 2 Wall. 24; Gebb v. Rose, 40 Md. 387; Grove v. Todd, 41 Md. 633; 20 Am. Rep. 76.

10 Miller v. Wentworth, 82 Pa. St. 285; and see Hall v. Patterson, 51 Pa. St. 289; Kerr v. Russell, 69 Ill. 666.

11 Hecter v. Glasgow, 79 Pa. St. 79; Borland v. Walrath, 33 Iowa, 130; Hourtienne v. Schnoor, 33 Mich. 274; Ridgely v. Howard, 3 Har. & McH. 321.

12 Crain v. Cavana, 36 Barb. 410; Rowe v. Hamilton, 3 Me. 63; Martin v. Martin, 22 Ala. 104.

13 Marvin v. Smith, 46 N. Y. 571; Merchants' Bank v. Thomson, 55 N. Y. 7; Shaw v. Ross, 14 Me. 432; Harriman v. Gray, 49 Me. 537; Robinson v. Bates, 3 Met. 40.

14 Hastings v. Dickinson, 7 Mass. 153; Vance v. Vance, 21 Me. 364; Curry v. Curry, 10 Hun, 383; Townsend v. Townsend, 2 Sand. 711. Compare Foster v. Foster, 5 Hun, 557.

15 Marvin v. Smith, 46 N. Y. 571; and see Jackson v. Vanderheyden, 17 Johns. 167; 8 Am. Dec. 378. An inchoate right of dower may be cut off by a judgment in a partition suit, to which the claimant is made a party: Jordon v. Van Epps, 19 Hun, 526; 58 How. Pr. 338.

§ 67. Assignment of.—Although after the death of the husband the widow's right to dower is no longer contingent, but by that event becomes fixed and certain,[1] yet she is not in general entitled to enter upon any specific lands until her dower has been duly assigned to her by competent authority.[2] She is, however, entitled at common law to occupy the principal mansion-house of her husband, of which she is dowable,[3] and to be supported therein out of the estate for the space of forty days after the husband's death, within which time her dower should be assigned.[4] This term of residence is known as the widow's quarantine, which is a personal right,[5] and liable to forfeiture by a second marriage.[6]

The widow's quarantine is recognized by statute in the several States, but the duration of its enjoyment will be found to vary.[7]

1 Elmendorf *v.* Lockwood, 57 N. Y. 322.

2 Jackson *v.* O'Donaghy, 7 Johns. 247; Hoots *v.* Graham, 23 Ill. 81; Corey *v.* People etc. 45 Barb. 262; Bolster *v.* Cushman, 34 Me. 428; Robinson *v.* Miller, 1 Mon. B. 91; Windham *v.* Portland, 4 Mass. 384; Wallace *v.* Hall, 19 Ala. 367; Doe *v.* Nutt, 2 Car. & P. 430. Compare Gorham *v.* Daniels, 23 Vt. 600; Burke *v.* Barron. 8 Clarke, 132. Inchoate right of dower cannot be conveyed or assigned either absolutely or by way of mortgage: Marvin *v.* Smith, 46 N. Y. 574.

3 See Voelckner *v.* Hudson, 1 Sand. 215.

4 Co. Litt. 34 *b*; Seider *v.* Seider, 5 Whart. 208; McCulley *v.* Smith, 2 Bail. 103; Bank of U. S. *v.* Dunseth, 10 Ohio, 18; Shield *v.* Batts, 5 Marsh. J. J. 13; Menifee *v.* Menifee, 3 Eng. (Ark.) 9.

5 See Stokes *v.* McAllister, 2 Mo. 163; Wallis *v.* Doe, 2 Smedes & M. 220.

6 Co. Litt. 34 *b*.

7 See Barnet *v.* Barnet, 15 Serg. & R. 71; Pharis *v.* Leachman, 25 Ala. 662; Singleton *v.* Singleton, 5 Dana, 89; Corey *v.* People etc. 45 Barb. 262. In Connecticut an assignment of dower is not necessary to entitle the widow to enter, and upon the death of her husband she becomes immediately tenant in common with his heirs, and remains such until her dower is set out in severalty: Stedman *v.* Fortune, 5 Conn. 462. See also Singleton *v.* Singleton, 5 Dana, 89; Rambo *v.* Bell, 3 Kelly, 207; Den *v.* Dodd, 6 N. J. L. 367.

§ 68. Who may assign.—Dower must be assigned by the heir or other tenant of the freehold, where recourse is not had to legal proceedings.[1] An assignment by an infant heir is good, subject only to be corrected in his favor by a writ of admeasurement of dower, if by mistake it be excessive.[2] If the heir be under guardianship, the guardian may assign.[3] If a disseizor, abator, or intruder assigns dower, without fraud or covin, it is good.[4]

1 Co. Litt. 35 *a*; 1 Greenl. Cruise, 169; Ellicott *v.* Mosier, 11 Barb. 574; Stoughton *v* Leigh, 1 Taunt. 402; Norwood *v.* Marrow, 4 Dev. & B. 442; and see Moore *v.* Waller, 2 Rand. 418; Hurd *v.* Grant, 3 Wend. 340.

2 Hoby *v.* Hoby, 1 Vern. 218; Jones *v.* Brewer, 1 Pick. 314; Gove *v.* Perdue, Cro. Eliz. 309; Eagles *v.* Eagles, 2 Hayw. 181.

3 Jones *v.* Brewer, 1 Pick. 314; Curtis *v.* Hobart, 41 Me. 230.

4 Co. Litt. 35 *a*; 1 Greenl. Cruise, 169; Parker *v.* Murphy, 12 Mass. 485. Where the widow is obliged to resort to legal proceedings to obtain an assignment, it is made by the sheriff: 1 Greenl. Cruise, 169; Fenny *v.* Durrant, 1 Barn. & Ald. 40.

§ 69. How assigned.—Dower may be assigned by parol, if accepted by the widow, as well as by an instrument in writing;[1] for her estate is not created, but only ascertained, by assignment.[2] And where the widow and the heir made a parol agreement as to the division between them of the rents and profits of a mine, such agreement was deemed an assignment of dower, and valid under the statute of frauds.[3] Dower must, as a general rule, be assigned by metes and bounds;[4] but if this be impracticable, it may be assigned out of the rents and profits, or the parties may occupy the whole alternately.[5] Thus, if dower in mines cannot be assigned by metes and bounds, the parties may have an alternate occupancy of the whole, or the widow may take a third of the rents and profits.[6] So in the case of a mill, which is not divisible, the widow may be endowed in a special manner, as by having every third toll-dish, or the entire mill every third year or month, or by taking a share of the profits in some other form.[7] And in the case of incorporeal hereditaments, dower must be assigned in a special manner, having respect to the nature of the subject and the mode of enjoyment.[8] The right to an assignment by metes and bounds may be waived by the widow,[9] and in such case an assignment to hold her dower in common, and not in severalty, will bind her.[10] An assignment against common right is where the widow accepts an assignment of one parcel in satisfaction of her claim upon each separate portion of the husband's lands;[11] and it is a principle in such cases that she takes, subject to all encumbrances by the husband.[12] She has accepted what could not have been lawfully assigned to her against her will;[13] and if the estate turns out to be more valuable than a third, she may still hold it; but if it proves less valuable, she must bear the loss.[14] But the assignment of dower must be for the widow's life;[15] and it must be absolute, and not accompanied by any condition.[16] If an assignment of dower not against common

right proves to be inoperative, as where the widow has been lawfully evicted from the land assigned to her, she is entitled to be endowed anew[17] out of the balance of the estate.[18]

1 Jones *v.* Brewer, 1 Pick. 314; Johnson *v.* Neil, 4 Ala. 166; Meserve *v.* Meserve, 19 N. H. 240; Curtis *v.* Hobart, 41 Me. 230; Rowe *v.* Power, 5 Bos. & P. 1; and see Gibbs *v.* Esty, 23 Hun, 266.

2 Co. Litt. 35 *a*; Williams *v.* Bennett, 4 Ired. 122; Shattuck *v.* Gregg, 23 Pick. 189; Conant *v.* Little, 1 Pick. 191. The widow cannot transfer her dower until after assignment. Lamar *v.* Scott, 4 Rich. 516; Newman *v.* Willetts, 48 Ill. 534. The settled law in New York is, that the dower interest which a widow has in lands of which her deceased husband had been seized is, although unmeasured, assignable as a right in action, and is liable in equity for her debts: Payne *v.* Becker, 87 N. Y. 153; reversing S. C. 22 Hun, 23. And see Potter *v.* Everitt, 7 Ired. Eq. Cas. 152.

3 Lenfers *v.* Henke, 73 Ill. 405; 24 Am. Rep. 263.

4 Stevens *v.* Stevens, 3 Dana, 373; Pierce *v.* Williams, 2 Pen. (N. J.) 709; Barney *v.* Frownar, 9 Ala. 901; Booth *v.* Lambert, Style, 276; Smith *v.* Smith, 6 Lans. 313.

5 Heth *v.* Cocke, 1 Rand. 344; White *v.* Story, 2 Hill, 543; Lenfers *v.* Henke, 73 Ill. 405; 24 Am. Rep. 263; Chase's Case, 1 Bland Ch. 207; 17 Am. Dec. 277.

6 Coates *v.* Cheever, 1 Cowen, 460.

7 1 Greenl. Cruise, 169; White *v.* Story, 2 Hill, 543.

8 White *v.* Story, 2 Hill, 543; Chase's Case, 1 Bland Ch. 207; 17 Am. Dec. 277; Hyzer *v.* Stoker, 3 Mon. B. 117. In New York, rooms in a building can be assigned for dower, with the widow's consent, but it seems not against her consent: Parks *v.* Hardey, 4 Bradf. 15; Stewart *v.* Smith, 39 Barb. 167.

9 1 Greenl. Cruise, 169; Cootes *v.* Lambert, 9 Vin. Abr. 256.

10 Rowe *v.* Power, 2 Bos. & P. N. R. 1.

11 Jones *v.* Brewer, 1 Pick. 314.

12 Mantz *v.* Buchanan, 1 Md. Ch. 202; French *v.* Pratt, 27 Me. 381.

13 Jones *v.* Brewer, 1 Pick. 314.

14 Jones *v.* Brewer, 1 Pick. 314; Holloman *v.* Holloman, 5 Smedes & M. 559; Scott *v.* Hancock, 13 Mass. 162.

15 Co. Litt. 34 *b*; Ellicott *v.* Mosier, 11 Barb. 574.

16 Wentworth *v.* Wentworth, Cro. Eliz. 451; Bullock *v.* Finch, 1 Rolle Abr. 682.

17 Scott *v.* Hancock, 13 Mass. 162.

18 Scott *v.* Hancock, 13 Mass. 162; see Pierson *v.* Williams, 23 Miss 64; Willet *v.* Beatty, 12 Mon. B. 172.

§ 70. How recovered.—If the heir or other tenant of the freehold refuses to assign dower to the widow, she may bring her action at law by writ of dower, *unde nihil habet*;[1] if dower has been assigned in part, her remedy is by "writ of right of dower," which lies also where no

dower has been assigned.[2] The latter remedy is scarcely known in this country;[3] and the former is a preferable remedy, for the reason that under it the widow is entitled to recover damages for the non-assignment of her dower.[4] It can be brought, however, only against the owner or tenant of the freehold;[5] and a demand for dower is in general necessary before commencing the action.[6] But such demand need not be in writing,[7] and it may be made by attorney;[8] and the power of such attorney need not be in writing.[9] The demand should describe with reasonable certainty the land in which the dower is claimed;[10] though it will be deemed sufficient if it give notice to the tenant to what land the demand refers.[11] In some of the States the common-law action of dower is abolished, and a statutory action substituted in its place.[12] Under the New York statute, a widow's action for dower must be brought against the actual occupant of the land of which she is dowable;[13] or if the land be not occupied, against some person exercising acts of ownership thereupon, or claiming title to or an interest therein at the time of the commencement of the action.[14] In many of the States, the common-law remedy for the recovery of dower has to a great extent been superseded by a summary process, issuing from courts having jurisdiction of the estates of deceased persons.[15] But, generally speaking, these summary proceedings can only be resorted to where the husband died seized of the lands from which dower is claimed, and the widow's right is not disputed by the heirs or devisees;[16] the right to dower, if denied, remains open for investigation in the ordinary course of justice, and the widow may be driven to her action at law.[17] In many cases, courts of equity have concurrent jurisdiction with courts of law over actions for the recovery of dower;[18] and in some cases the former courts have exclusive jurisdiction.[19] Where the legal title to dower is in controversy, the remedy is at law;[20] but if the widow's title is admitted, and impedi-

ments are thrown in the way of her proceeding at law, a court of equity can assume jurisdiction, and give her relief for her dower.[21] Generally, the widow is dowable in the equity of redemption of an estate mortgaged by her husband before coverture,[22] and in such case her proper remedy is in a court of equity;[23] and the rule is the same when the mortgage is executed by the husband and wife during coverture.[24]

1 1 Greenl. Cruise, 172; Co. Litt. 32 *b*; Waters *v.* Gooch, 6 Marsh. J. J. 586; 22 Am. Dec. 108.

2 1 Greenl. Cruise, 172; and see Kidder *v.* Blaisdell, 45 Me. 461.

3 See 4 Kent Com. 63.

4 4 Kent Com. 63; and see Watson *v.* Watson, 10 Com. B. 3; Hitchcock *v.* Harrington, 6 Johns. 290; Layton *v.* Butler, 4 Har. (Del.) 507. The widow's remedy for the assignment of dower is not within the operation of the Statute of Limitations: Barnard *v.* Edwards, 4 N. H. 109; Ridgeway *v.* McAlpine, 31 Ala. 453. Yet a delay of twenty years will defeat her claim in equity: Barksdale *v.* Garrett, 64 Ala. 277; 38 Am. Rep. 6.

5 Hurd *v.* Grant, 3 Wend. 340; Miller *v.* Beverly, 1 Hen. & M. 368; Beddingford's Case, 9 Co. R. 17.

6 See Co. Litt. 33 *a*; Robie *v.* Flanders, 33 N. H. 524; Leavitt *v.* Lamprey, 13 Pick. 382; Layton *v.* Butler, 4 Har. (Del.) 507; Ford *v.* Erskine, 45 Me. 484; Burbank *v.* Day, 12 Met. 557; Watson *v.* Watson, 10 Com. B. 3.

7 Page *v.* Page, 6 Cush. 196; Baker *v.* Baker, 4 Me. 67.

8 Luce *v.* Stubbs, 35 Me. 92; Stevens *v.* Reed, 37 N. H. 49; and see Watson *v.* Watson, 10 Com. B. 3.

9 Luce *v.* Stubbs, 35 Me. 92.

10 Baker *v.* Baker, 1 Me. 67; Davis *v.* Walker, 42 N. H. 482.

11 Bear *v.* Snyder, 11 Wend. 592; Atwood *v.* Atwood, 22 Pick. 283. Compare Ford *v.* Erskine, 45 Me. 484; Sloan *v.* Whitman, 5 Cush. 532.

12 See 2 N. Y. Rev. Stats. 303; Yates *v.* Paddock, 10 Wend. 529; Code Civ. Proc. (N. Y.) §§ 1596–1625.

13 Code Civ. Proc. § 1597; and see Sherwood *v.* Vandenburgh, 2 Hill, 303; Kyle *v.* Kyle, 3 Hun, 458.

14 Code Civ. Proc. §§ 1597–8; compare Ellicott *v.* Mosier, 11 Barb. 574; 7 N. Y. 201; and see Hopper *v.* Hopper, 2 N. J. 715.

15 See Townsend *v.* Townsend, 2 Sand. 711; Sheafe *v.* O'Neil, 9 Mass. 10; Caruthers *v.* Wilson, 1 Smedes & M. 527; Scott *v.* Scott, 1 Bay, 507; Tilson *v.* Thompson, 10 Pick. 359; Rittenhouse *v.* Loerling, 6 Watts & S. 190; Danforth *v.* Smith, 23 Vt. 247; Stevens *v.* Stevens, 3 Dana, 371. In Alabama, the statutory method of assigning dower is held to be merely cumulative: Johnson *v.* Nell, 4 Ala. 166; and see Evans *v.* Evans, 9 Pa. St. 190.

16 Stiver *v.* Cawthorn, 4 Dev. & B. 501; French *v.* Crosby, 23 Me. 276; Sheafe *v.* O'Neil, 9 Mass. 10. See Code Civ. Proc. (N. Y.) §§ 1608–9.

17 Matter of Watkins, 9 Johns. 246; Jackson *v.* Randall, 5 Cowen, 168; and see Parker *v.* Hardy, 4 Bradf. 15; Williams *v.* Morgan, 1 Litt. 167.

18 Herbert v. Wren, 7 Cranch. 376; Stevens v. Smith, 4 Marsh. J. J. 64; Scott v. Crawford, 11 Gill & J. 379; Brown v. Brown, 4 Robt. 688; 31 How. Pr. 481; Potter v. Barclay, 15 Ala. 439.

19 See Gibson v. Crehore, 5 Pick. 146; Taylor v. McCrackin, 2 Blackf. 260; Swaine v. Perine, 5 Johns. Ch. 482; Kiddall v. Trimble, 1 Md. Ch. 143.

20 Wells v. Beall, 2 Gill & J. 468; Badgley v. Bruce, 4 Paige, 98; Hartshorne v. Hartshorne, 1 Green Ch. 349.

21 Swaine v. Perine, 5 Johns. Ch. 482.

22 But compare Burson v. Dow, 65 Ill. 146.

23 Van Dyne v. Thayre, 19 Wend. 162; Smith v. Gardner, 42 Barb. 356.

24 Wheeler v. Morris, 2 Bosw. 524; Woods v. Wallace, 10 Fost. 384; Denton v. Nanny, 8 Barb. 618; Willet v. Beatty, 12 Mon. B. 172; Keith v. Trapier, 1 Bail. Eq. 63; Bank of Commerce v. Owens, 31 Md. 320; 1 Am. Rep. 60; compare Newhall v. Lynn etc. Sav. Bank, 101 Mass. 428; 3 Am. Rep. 387.

§ 71. Damages, etc.—Damages were not recoverable in an action of dower at common law.[1] But by the statute of Merton (20 Hen. 3, ch. 1), in an action against the heir, the widow shall have her damages from the day of her husband's death, when he dies seized;[2] though, as against an alienee, only from the time that dower is demanded.[3] The rule of damages is one-third of the value of the annual rents and profits of the estate out of which dower is claimed.[4] But the length of time for which this allowance shall be made will be found to vary in different States.[5] The time for commencing a suit for dower is usually limited by statute to twenty years from the husband's death,[6] or from demand,[7] or the removal of certain disabilities.[8] Judgment in an action for dower is for the recovery of possession,[9] with damages and costs, when recoverable.[10]

1 Embree v. Ellis, 2 Johns. 119, 124; and see Bank of U. S. v. Dunseth, 10 Ohio, 18; Heyward v. Cuthbert, 1 McCord, 386.

2 Hitchcock v. Harrington, 6 Johns. 290; Layton v. Butler, 4 Har. (Del.) 507; Seaton v. Jamison, 7 Watts, 533; Fisher v. Morgan, Coxe, 125. See Watson v. Watson, 10 Com. B. 3.

3 Jackson v. O'Donaghy, 7 Johns. 247; and see Waters v. Gooch, 6 Marsh. J. J. 586; McClanahan v. Porter, 10 Mo. 746; Leavitt v. Lamprey, 13 Pick. 382; 23 Am. Dec. 685; Chase's Case, 1 Bland, 206; 17 Am. Dec. 277.

4 4 Kent Com. 65; 1 Washb. Real Prop. 232; Layton v. Butler, 4 Har. (Del.) 507; and see Code Civ. Proc. (N. Y.) § 1600; Perry v. Goodwin, 6 Mass. 490; Waters v. Gooch, 6 Marsh. J. J. 586; 22 Am. Dec. 108.

5 See Code Civ. Proc. (N. Y.) § 1600; Bell *v.* New York, 10 Paige, 70; Seaton *v.* Jamison, 7 Watts, 533; Beavers *v.* Smith, 11 Ala. 20; Campbell *v.* Murphy, 2 Jones Eq. 357; Francis *v.* Garrard, 18 Ala. 794.

6 Stat. 3 and 4 Wm. 4, c. 27; Code Civ. Proc. (N. Y.) § 1596. See Caston *v.* Caston, 2 Rich. Eq. 1; Durham *v.* Jugier, 20 Me. 242; Tuttle *v.* Wilson, 10 Ohio, 24.

7 Robie *v.* Flanders, 33 N. H. 524.

8 Code Civ. Proc. (N. Y.) § 1596. Compare Barnard *v.* Edwards, 4 N. H. 107; Berrien *v.* Conover, 1 Har. (N. J.) 107; Crocker *v.* Fox, 1 Root, 227; Evans *v.* Evans, 29 Pa. St. 277; Guthrie *v.* Owen, 10 Yerg. 339; Sandford *v.* McLean, 3 Paige, 117; 23 Am. Dec. 773.

9 Co. Litt. 32 *b*; Taylor *v.* Brodrick, 1 Dana, 345; Shirtz *v.* Shirtz, 5 Watts, 255. See Code Civ. Proc. (N. Y.) § 1613; Waters *v.* Gooch, 6 Marsh. J. J. 586; 22 Am. Dec. 108.

10 Rowe *v.* Johnson, 19 Me. 146; Layton *v.* Butler, 4 Har. (Del.) 507; Sharp *v.* Pettit, 4 Dall. 212; Code Civ. Proc. (N. Y.) § 1600. There can be no judgment for damages unless there be a judgment for the widow's seizin of dower: Turney *v.* Smith, 14 Ill. 242; Atkins *v.* Yeomans, 6 Met. 438. A judgment in dower for an unascertained sum of money is held to be void: May *v.* May, 7 Fla. 207. Repairs made by the tenant of premises in which dower is claimed, for the purpose of keeping the house in a tenantable condition, are not improvements, properly so called, upon the premises, to the expenses of which the demandant, before the assignment of her dower, is under any obligation to contribute: Walsh *v.* Wilson, 131 Mass. 535. Recovery of dower at law does not preclude a recovery in equity of the rents and profits in a subsequent suit: Sellman *v.* Bowen, 8 Gill & J. 50; 29 Am. Dec. 524.

CHAPTER VII.

JOINTURE.

§ 72. Definition.
§ 73. Requisites of.
§ 74. When a bar of dower.
§ 75. How lost.
§ 76. Equitable jointures.
§ 77. Who may take.
§ 78. Waste, etc.
§ 79. Effect of eviction from.
§ 80. Favored in equity.

§ 72. Definition and origin.—A jointure is defined to be a freehold estate in lands, tenements, or hereditaments secured to the wife, to take effect on the decease of the husband, and to continue during her life at least, unless she be herself the cause of its determination.[1] It is in the nature of a provision made by the husband for the wife in lieu of her dower.[2] At common law, a jointure

made to a wife before or after marriage was no bar to her dower, because the dower, being a freehold estate, could not be barred by any collateral satisfaction.[3] And a jointure, as above defined, is founded on the statute of 27 Hen. 8, ch. 10, commonly known as the "statute of uses."[4]

1 Co. Litt. 36 *b*; Hastings *v.* Dickinson, 7 Mass. 153; 5 Am. Dec. 34; Vance *v.* Vance, 22 Me. 364. See Tevis *v.* McCreary, 3 Met. (Ky.) 151.

2 Drury *v.* Drury, 2 Eden, 38, 72.

3 Vernon's Case, 4 Rep. 1; Vincent *v.* Spooner, 2 Cush. 467, 473; Hastings *v.* Dickinson, 7 Mass. 153; 5 Am. Dec. 34.

4 See 1 Greenl. Cruise, 188; McCartee *v.* Teller, 8 Wend. 275; Gelzer *v.* Gelzer, 1 Bail. Eq. 387; 23 Am. Dec. 180.

§ 73. Requisites of.—No estate limited to a woman under the provisions of the statute, 27 Hen. 8, ch. 10, shall be deemed a good jointure, and a bar to dower, unless it has certain requisites prescribed by that act.[1] Thus, it must take effect, in possession or profit, immediately from the death of the husband; it must be for the wife's life at least; it must be limited to the wife herself, and not to another in trust for her; it must be made in satisfaction of her whole dower, and so expressed to be in the deed; and it is required to be made before marriage.[2]

1 See Caruthers *v.* Caruthers, 4 Bro. C. C. 500; McCartee *v.* Teller, 2 Paige, 511; 8 Wend. 267.

2 Co. Litt. 36 *b*; Vernon's Case, 4 Rep. 3; 2 Blackst. Com. 138; Smith *v.* Smith, 5 Ves. 192; Vance *v.* Vance, 22 Me. 364; Crain *v.* Cavana, 36 Barb. 410; Garthshore *v.* Chalie, 10 Ves. 1, 20; Charles *v.* Andrews, 9 Mod. 152; Ambler *v.* Norton, 4 Har. & McH. 23.

§ 74. When a bar of dower.—A jointure having all the requisites enumerated in the preceding section [1] is, as a general rule, absolutely binding upon the wife, and completely bars her claim to dower;[2] and this is so, although she was an infant at the time of the settlement.[3] There are also other provisions made by the husband for the wife, which are to be deemed good jointures within the statute, if accepted by the wife after her husband's death.[4] Thus, a settlement made by the husband after

marriage, and during coverture, may be rejected by the widow after his death, in which case she may claim dower;[5] but if she accepts of such jointure, she is thereby bound, and her claim to dower is barred.[6] She is not, however, bound by her assent to a settlement, whether made before or after marriage, which lacks the legal requisites of a jointure;[7] and in such case she may claim both the estate settled and her dower in the residue of her husband's lands.[8] The value of the estate limited must be a reasonable and competent livelihood for the wife,[9] having reference to the circumstances and situation in life of the parties, the value of the husband's estate, and the extent of the portion received with the wife on her marriage.[10] It is not necessary that the estate limited should proceed directly from the husband;[11] if it comes from the father of the husband, or through the medium of trustees, it is good.[12] But it must consist wholly of land, and a legal jointure cannot be composed partly of a freehold and partly of an annuity, not secured upon land.[13]

1 § 73, *ante*.

2 Vernon's Case, 4 Rep. 1; Ambler *v.* Norton, 4 Har. & McH. 2.

3 Drury *v.* Drury, 5 Brown Parl. C. 370; McCartee *v.* Teller, 2 Paige, 511; 8 Wend. 297; and see Shaw *v.* Boyd, 5 Serg. & R. 309. Under the New York statute, the assent of the wife to the jointure must be evidenced, if she be of full age, by her becoming a party to the conveyance by which it shall be settled; if she be an infant, by her joining with her father or guardian in such conveyance: 1 Rev. Stat. 741, § 10; McCartee *v.* Teller, 2 Paige, 559. So in Wisconsin: Rev. Stat. 334.

4 1 Greenl. Cruise, 192.

5 Co. Litt. 36 *b*; Frank *v.* Frank, 3 Mylne & C. 171.

6 Frank *v.* Frank, 3 Mylne & C. 171; Vance *v.* Vance, 22 Me. 364; Hastings *v.* Dickinson, 7 Mass. 153; 5 Am. Dec. 34.

7 McCartee *v.* Teller, 8 Wend. 275, 278. A jointure settled on a wife by articles to which she was no party will not deprive her of dower: Daly *v.* Lynch, 3 Brown Parl. C. 497.

8 McCartee *v.* Teller, 8 Wend. 275.

9 Co. Litt. 36 *b*.

10 McCartee *v.* Teller, 2 Paige, 511.

11 1 Greenl. Cruise, 195.

12 1 Greenl. Cruise, 195; Ashton's Case, Dyer, 228.

13 Vance *v.* Vance, 22 Me. 364. In Connecticut, a jointure may consist of personal as well as real property: 1 Swift Dig. 86; and see Andrews *v.* Andrews, 8 Conn. 79. So in Virginia: Craig *v.* Walthall, 14 Gratt. 518.

§ 75. How lost.—In England, a jointure is not lost by the elopement of the wife and her living in adultery.[1] And although the husband had committed treason or felony, yet the widow was entitled to her jointure.[2] A jointure is not liable to be defeated by the alienation of the husband alone, but it may be barred if the wife joins her husband in the conveyance.[3] If she and her husband join in conveying away lands settled on her as her jointure before marriage, she thereby loses not only the jointure, but her claim to dower is also barred;[4] but if the settlement was made after marriage, she is in such case remitted to her right to claim dower in the residue of her husband's lands.[5] In case of a devise to a wife, made expressly as a substitute for her jointure, she cannot have both, but must make her election.[6]

1 1 Greenl. Cruise, 209; and see Sidney *v.* Sidney, 3 P. Wms. 269; Seagrave *v.* Seagrave, 13 Ves. 443; Buchanan *v.* Buchanan, 1 Ball & B. 206. In some of the States jointure is barred by elopement and adultery: See 1 N. Y. Rev. Stat. 742, § 15.

2 1 Greenl. Cruise, 209.

3 1 Greenl. Cruise, 208.

4 Co. Litt. 36 *b*; Dyer, 358 *b*.

5 Co. Litt. 36 *b*; 1 Greenl. Cruise, 208.

6 1 Greenl. Cruise, 220; Grandison *v.* Pitt, 2 Abr. Ca. Eq. 392; and see Montague *v.* Maxwell, 4 Brown Parl. C. 598.

§ 76. Equitable jointures.—Any provision made for a woman before marriage, if she be of age, and accepts it in satisfaction of her dower, may constitute a good equitable jointure.[1] So a provision in lieu of dower for an infant, if settled on her before marriage by the consent and approbation of her parents or guardian, is an equitable bar to her dower;[2] but in the latter case, it is necessary that the provision, in order to be binding, should be as beneficial to the infant, and as certain as that required in a legal jointure to constitute a legal bar.[3] If the provision be made after marriage, it may be accepted or rejected by the widow after the husband's death, as in the case of a legal jointure;[4] but she must elect between the equitable jointure or her dower, and

cannot have both.[5] An equitable jointure proceeds on the idea of a contract on the part of the wife to accept a certain provision in lieu of dower;[6] thus differing from a legal jointure, which is a provision made, and not merely a contract for a provision.[7]

1 See Williams *v.* Chitty, 3 Ves. 545; Estcourt *v.* Estcourt, 1 Cox, 29; Seys *v.* Price, 9 Mod. 219; Lacy *v.* Anderson, 1 Swanst. 445; Caruthers *v.* Caruthers, 4 Bro. C. C. 513; Dyke *v.* Rendall, 2 DeGex M. & G. 209; Selleck *v.* Selleck, 8 Conn. 85 *n.*

2 Caruthers *v.* Caruthers, 4 Bro. C. C. 513; McCartee *v.* Teller, 2 Paige, 559; Drury *v.* Drury, 3 Eden, 60; Smith *v.* Smith, 5 Ves. 189.

3 McCartee *v.* Teller, 2 Paige, 560.

4 1 Greenl. Cruise, 194.

5 Caruthers *v.* Caruthers, 4 Bro. C. C. 513; Swaine *v.* Perine, 5 Johns. Ch. 482.

6 Dyke *v.* Rendall, 2 DeGex, M. & G. 209; 1 Washb. Real Prop. 267.

7 See § 72, *ante*; Drury *v.* Drury, 2 Eden, 38, 72. The distinction between legal and equitable jointures is abolished in New York: McCartee *v.* Teller, 2 Paige, 511.

§ 77. Who may take.—A jointure being an estate limited to a woman in lieu of dower, it follows that all persons who are capable of being endowed may take a jointure.[1] A jointure, to be strictly legal, should be made to a woman herself, and not to another in trust for her, although she should assent;[2] but a provision or settlement on the wife, though by way of trust, if in other respects good, will be enforced in a court of equity.[3]

1 1 Greenl. Cruise, 195.

2 Co. Litt. 36 *b*.

3 Hervey *v.* Hervey, 1 Atk. 563; and see § 76, *ante*.

§ 78. Waste, etc.—If the wife has only a life estate in her jointure lands, she has no right to commit waste, and will be restrained therefrom, as other tenants for life.[1] But if there is a covenant in the instrument of settlement that the lands shall be of a certain yearly value, she will not be restrained from committing waste so far as may be necessary to make up a deficiency.[2] A jointure, unlike dower, is not a continuance of the husband's estate; and a jointress is not, therefore, entitled to the crops which were sown at the time of his death.[3]

1 Bassett v. Bassett, Finch, 189; Cook v. Windford, 1 Abr. Ca. Eq. 221; 1 Greenl. Cruise, 200.

2 Carew v. Carew, 1 Abr. Ca. Eq. 221; 1 Atk. Conv. 272.

3 Fisher v. Forbes, 9 Vin. Abr. 373.

§ 79. Effect of eviction from.—If the wife be evicted of her jointure, which has been regularly settled upon her, she may be let in to claim her dower, either *pro tanto* or entirely, as the case may be, in other lands of her husband;[1] and in such case, she may even claim her dower in lands purchased by the husband during coverture and aliened again before his death.[2] And this right upon eviction is the same, whether the jointure was settled before or after the marriage.[3]

1 Ambler v. Norton, 4 Hen. & M. 23; Hastings v. Dickinson, 7 Mass. 153; 5 Am. Dec. 34. Compare Finch v. Finch, 10 Ohio St. 501.

2 1 Greenl. Cruise, 200.

3 Beard v. Nuttall, 1 Vern. 427; Gervoye's Case, Moore, 717.

§ 80. Favored in equity.—In equity, a jointress is regarded as a purchaser, marriage alone being deemed a valuable consideration;[1] hence equity will always interfere for her protection, and in the case of a mere agreement to settle a jointure, a specific performance of it will be decreed.[2] And where the agreement is to settle a jointure before marriage, a marriage without such settlement is no waiver, and the wife may enforce it in equity after the husband's death.[3] And although a settlement be very unequal, operating strongly in favor of the wife, yet equity will not grant relief against it.[4] So a jointress being deemed a purchaser, equity will relieve her against a prior voluntary conveyance.[5] But in the absence of fraud, a prior voluntary conveyance is good, as against a subsequent purchaser for valuable consideration, with actual notice.[6] If the jointure is expressed to be of a certain yearly value, and afterwards prove deficient, equity will make up the deficiency from the husband's estate.[7]

1 See Campion v. Cotton, 17 Ves. 267; Sterry v. Arden, 1 Johns. Ch. 271; 12 Johns. 536; 7 Am. Dec. 343; Huston v. Cantril, 11 Leigh, 136; Herring v. Wickham, 29 Gratt. 628; Jones's Appeal, 62 Pa. St. 324.

2 Sydney *v.* Sydney, 3 P. Wms. 276; Buchanan *v.* Buchanan, 1 Ball & B. 206.

3 Coventry *v.* Coventry, 2 P. Wms. 222; Hayner *v.* Hayner, 1 Vent. 343; 1 Greenl. Cruise, 203.

4 Whitfield *v.* Taylor, Show. Parl. C. 20.

5 1 Greenl. Cruise, 205.

6 Jackson *v.* Town, 4 Cowen, 603; Cathcart *v.* Robinson, 5 Peters, 280; Ricker *v.* Ham, 14 Mass. 139; 4 Kent Com. 463, 464.

7 Probert *v.* Morgan, 1 Atk. 440; Glegg *v.* Glegg, 2 Abr. Ca. Eq. 27; and see Hedges *v.* Everard, 1 Abr. Ca. Eq. 18; Eustace *v.* Keightley, 4 Brown Parl. C. 588.

CHAPTER VIII.

ESTATES FOR YEARS.

§ 81. Origin and description of.
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§ 83. Tenant for has no seizin.
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§ 81. Origin and description of. — Estates for years constitute the most important class of those embraced within the division of estates less than freehold.[1] They were originally granted to mere farmers or husbandmen, in consideration of an annual return in money, provisions, or other rent to the lessors or landlords;[2] but the latter, in order to encourage them to manure and cultivate the ground, granted them a sort of permanent interest for a limited period, founded upon contract express or implied, and not determinable at the will of the lord.[3] Hence an estate for years is defined to be an interest in lands or tenements, by virtue of a contract for the possession of them, for some determinate period.[4] Such period may, however, be for any less time than a year, as a half-year or a quarter, and the tenant will still have an estate for years; a year being the shortest term of which the law in this case takes notice.[5] And it may

be for any definite number of years, however great.[6] But every estate for years must have a certain beginning and a certain end, and therefore the word "term" is frequently used to designate this estate.[7] The word "term" may, however, not only signify the duration of the interest in the lands, but also the interest itself;[8] and therefore it may so happen that the term will expire during the continuance of the time—as by surrender, forfeiture, and the like.[9] Which sense ought to be given to the word when used in an instrument becomes merely a question of construction.[10] An estate limited to a person for twenty-one years, if A shall live so long, is but an estate for years, because there is a certain period fixed, beyond which it cannot last.[11] So under a devise for the payment of debts, or until the devisor's debts are paid, the executors take an estate only for so many years as are necessary to raise the required sum.[12] And so where an estate is devised till such time as a certain sum shall be raised out of the rents and profits thereof.[13]

1 See § 14, *ante*.

2 1 Greenl. Cruise, 223; 2 Blackst. Com. 141.

3 2 Blackst. Com. 141; 1 Washb. Real Prop. 290.

4 2 Blackst. Com. 139; 4 Kent Com. 85; 1 Bouv. Dict. 541; and see Hitchman *v.* Walton, 4 Mees. & W. 409.

5 Co. Litt. 54 *b*; 2 Blackst. Com. 139; 1 Greenl. Cruise, 223; Gould *v.* School District, 8 Minn. 431; Brown *v.* Bragg, 22 Ind. 122; Tolle *v.* Orth, 75 Ind. 298; 39 Am. Rep. 147; Schuyler *v.* Smith, 51 N. Y. 309; 10 Am. Rep. 609. Terms for years last during the whole anniversary of the day on which they were granted: Ackland *v.* Lutley, 9 Ad. & E. 879. See Bartol *v.* Calvert, 21 Ala. 42; Brewer *v.* Harris, 5 Gratt. 285.

6 Co. Litt. 46 *a*; and see Gay's Case, 5 Mass. 419; Chapman *v.* Gray, 15 Mass. 439; Brewster *v.* Hill, 1 N. H. 350; Spangler *v.* Stamler, 1 Md. Ch. 36. In England a term for a very long period, as 2,000 years, is regarded as a term to attend the inheritance: Denn *v.* Barnard, Cowp. 597; and see 4 Kent Com. 86, *et seq.*

7 Co. Litt. 45 *b*; 1 Greenl. Cruise, 223; and see Batchelder *v.* Dean, 16 N. H. 268; Doe *v.* Dixon, 9 East, 15.

8 2 Blackst. Com. 144; Wright *v.* Cartwright, 1 Burr. 284.

9 2 Blackst. Com. 144; and see Jackson *v.* Vincent, 4 Wend. 633.

10 Wright *v.* Cartwright, 1 Burr. 284; Evans *v.* Vaughan, 4 Barn. & C. 261.

11 Co. Litt. 45 *b*; 2 Blackst. Com. 143.

12 1 Greenl. Cruise, 223.

13 Corbet's Case, 4 Rep. 81 *b*; 1 Greenl. Cruise, 223; and see Doe *v.* Needs, 2 Mees. & W. 129; Horner *v.* Leeds, 25 N. J. L. 106.

§ 82. How created.—An estate for years is always created by act of parties—by a contract, either express or implied, technically called a lease.[1] In some cases, a lease, like other deeds and grants, may be presumed from long possession of lands, which cannot otherwise be explained.[2] The contract usually provides for the reservation of rent or other like return for the use of the premises;[3] but a reservation of rent is not essential to the existence of a leasehold estate.[4]

1 See Little *v.* Libby, 2 Me. 242; 11 Am. Dec. 68; Harris *v.* Frink, 49 N. Y. 24; 10 Am. Rep. 318.

2 Carver *v.* Jackson, 4 Peters, 84.

3 See Jackson *v.* Harsen, 7 Cowen, 323; 17 Am. Dec. 517; Allen *v.* Lambden, 2 Md. 279; Hunt *v.* Comstock, 15 Wend. 665.

4 Failing *v.* Schenck, 3 Hill, 344; McKissack *v.* Bullington, 37 Miss. 575; and see chap. 9, *post*.

§ 83. Tenant for has no seizin.—A tenant for years is not said to be seized of the lands, and a mere delivery of a lease for years does not vest any estate in the lessee, but only gives him a right of entry on the land.[1] The interest which he acquires by the delivery of the lease, and before an actual entry, is called an *interesse termini*,[2] or a right to the possession of a term at a future time.[3] But when the lessee has actually entered, the estate becomes vested in him, and he is then said to be possessed, not properly of the land, but of the term for years, the seizin of the freehold still remaining in the lessor.[4] In case of the lessee's death before entry, the right to enter passes to his executors or administrators.[5] And this *interesse termini* is a right which may be assigned or granted away by the lessee,[6] but it cannot be surrendered.[7] Before entry, a lessee cannot maintain trespass against a stranger;[8] but a mere right of entry is sufficient to entitle him to maintain ejectment.[9] It is no defense to an action upon a lease to recover rent, that the lessee never had possession of the premises demised;[10] by leasing, the lessor does not warrant against the acts of strangers, or agree to put the lessee in actual possession.[11]

In the equitable action for use and occupation, the tenant is not answerable unless he has had the beneficial enjoyment of the property.[12] But this principle has never been applied to the action of covenant for the non-payment of rent, which does not depend on the fact of occupation or enjoyment.[13]

1 1 Greenl. Cruise, 224; and see Doe v. Walker, 5 Barn. & C. 111.

2 See Wms. Real Prop. 329; 1 Greenl. Cruise, 225.

3 Co. Litt. 46 *b*; 4 Kent Com. 97.

4 1 Greenl. Cruise, 224.

5 Co. Litt. 46 *b*.

6 Co. Litt. 46 *b*; and see Becar v. Flues, 64 N. Y. 520.

7 4 Kent Com. 97; and see Doe v. Walker, 5 Barn. & C. 111. By virtue of the operation of the statute of uses, an estate for years may now be created without actual entry: 4 Kent Com. 97; 1 Greenl. Cruise, 225. See chap. 9, *post*, tit. Lease.

8 Wheeler v. Montefiore, 2 Q. B. 142; Wilson v. Douglas, 2 Strob. 97.

9 Gardner v. Ketcltas, 3 Hill, 332; and see Mechanics' etc. Ins. Co. v. Scott, 2 Hilt. 550; Trull v. Granger, 8 N. Y. 115; Becar v. Flues, 64 N. Y. 520.

10 Mechanics' etc. Ins. Co. v. Scott, 2 Hilt. 550; Maverick v Lewis, 3 McCord, 216; Bellasis v. Burbriche, 1 Raym. Ld. 171.

11 Mechanics' etc. Ins. Co. v. Scott, 2 Hilt. 550; Becker v. De Forest, 1 Sweeny, 528.

12 Wood v. Hubbell, 5 Barb. 601; Salisbury v. Marshall, 4 Car. & P. 65; Collins v. Barrow, 1 Moody & R. 112.

13 Gilhooley v. Washington, 4 N. Y. 217; and see Townsend v. Gilsey, 7 Abb. Pr. N. S. 59; Lafarge v. Mansfield, 31 Barb. 345.

§ 84. May commence in futuro.—An estate for years may be created to commence *in futuro*, in which case the interest vests presently, although it does not take effect in possession until a future time.[1] The lessee has only an *interesse termini* between the date of the lease and the commencement of the term;[2] and the rules applicable to an *interesse termini* at common law are equally applicable to leases to commence *in futuro*.[3] The estate does not vest in the lessee until entry,[4] and a judgment against him creates no lien on the premises.[5] A term which is not to take effect within the period of a life or lives in being, and twenty-one years and the fraction of another year, is invalid within the doctrine of perpetuity.[6]

1 1 Greenl. Cruise, 226; Field *v.* Howell, 6 Ga. 423; Whitney *v.* Allaire, 1 N. Y. 311; Young *v.* Dake, 5 N. Y. 463; Becar *v.* Flues, 64 N. Y. 518.

2 Wood *v.* Hubbell, 10 N. Y. 487.

3 See 4 Kent Com. 97; 1 Washb. Real Prop. 297; Doe *v.* Walker, 5 Barn. & C. 111; § 83, *ante*.

4 Co. Litt. 46; Wood *v.* Hubbell, 10 N. Y. 488.

5 Crane *v.* O'Connor, 4 Edw. Ch. 409.

6 See Cadell *v.* Palmer, 1 Clark & F. 373; 10 Bing. 140; Wms. Real Prop. 328; Morrison *v.* Rossignol, 5 Cal. 64; Field *v.* Howell, 6 Ga. 423.

§ 85. Is a chattel real.—An estate for years is in law considered a chattel real.[1] It is an interest in land having the quality of immobility, which renders it real; but since the period for which it can last must always be fixed and determined,[2] it is deemed a mere chattel.[3] Hence, an estate for years does not pass to the heir of the owner upon the death of the latter, but vests in the executor, etc., as a part of the personal estate.[4]

1 Brewster *v.* Hill, 1 N. H. 350; Ex parte Gay, 5 Mass. 419; Osborne *v.* Humphrey, 7 Conn. 335; Bisbee *v.* Hall, 3 Ohio, 405; Cal. Civ. Code, § 765.

2 See § 81, *ante*.

3 2 Blackst. Com. 385; Spangler *v.* Stanler, 1 Md. Ch. 36; Murdock *v.* Ratcliff, 7 Ohio, 119.

4 Pugsley *v.* Aikin, 11 N. Y. 498; Chapman *v.* Gray, 15 Mass. 439; Dillingham *v.* Jenkins, 7 Smedes & M. 479; Ackland *v.* Pring, 3 Man. & G. 937; Mackay *v.* Mackreth, 4 Doug. 213; 2 Chit. 461.

§ 86. Incidents to.—The right to take *estovers* is incident to an estate for years;[1] but the tenant for years cannot commit waste,[2] and in the absence of a special agreement, he may be held liable in an action to his lessor for all waste done on the land demised, by whomsoever it may be committed.[3] And, in a proper case, an injunction will be granted to restrain the commission of waste.[4] So the personal representatives of a deceased lessee are liable to an action for waste done while they are in possession, but not for waste committed by the decedent.[5] As a general rule, if the term for years is certain, the tenant is not entitled to emblements;[6] but it is otherwise where the tenure is uncertain and dependent upon a contingency,[7] as where it is made determin-

able on the death of a particular person.[8] Tenant for years may remove fixtures,[9] but in the absence of an agreement or custom to the contrary, the removal must be made before the expiration of the term.[10] An estate for years, being a chattel interest, and vesting in the executor or administrator, is subject to the payment of simple contract debts;[11] and it is also liable to attachment and sale on execution.[12] But unless made so by statute, a judgment is no lien on the estate of a lessee for years.[13]

1 See Livingston *v.* Reynolds, 2 Hill, 157; Hubbard *v.* Shaw, 12 Allen, 120; Wetherell *v.* Howells, 1 Camp. 227; § 36, *ante.*

2 Freer *v.* Statenbur, 2 Abb. Ct. App. 189; 34 How. Pr. 440; Davis *v.* Alden, 2 Gray, 309; Simmons *v.* Norton, 7 Bing. 640. And see chap. 11, *post.*

3 Cook *v.* Champlain Transp. Co. 1 Denio, 91; Attersoll *v.* Stevens, 1 Taunt. 198; Parrott *v.* Barney, 2 Abb. U. S. 197. See also Burdett *v.* Withers, 7 Ad. & E. 136; Harnett *v.* Maitland, 16 Mees. & W. 257.

4 Pillsworth *v.* Hopton, 6 Ves. 51; DeWilton *v.* Saxon, 6 Ves. 106.

5 Hambly *v.* Trott, Cowp. 376; 1 Greenl. Cruise, 222.

6 Whitmarsh *v.* Cutting, 10 Johns. 361; Harris *v.* Carson, 7 Leigh, 632. Compare Iddings *v.* Nagle, 2 Watts & S. 22; Sanders *v.* Ellington, 77 N. C. 255.

7 Oland's Case, 5 Coke, 116 *b*; Kingsbury *v.* Collins, 4 Bing. 207; Harris *v.* Frink, 49 N. Y. 24; 10 Am. Rep. 318.

8 1 Greenl. Cruise, 234; and see Stewart *v.* Doughty, 9 Johns. 108.

9 Tate *v.* Blackburne, 43 Miss. 1; Holbrook *v.* Chamberlain, 116 Mass. 155; 17 Am. Rep. 146; Seeger *v.* Pettit, 77 Pa. St. 437; 18 Am. Rep. 452; Towne *v.* Fiske, 127 Mass. 125; 34 Am. Rep. 353; Hepsham *v.* Dettre, 89 Pa. St. 506; Ombony *v.* Jones, 19 N. Y. 234. And see § 9, *ante.*

10 Reynolds *v.* Shuler, 5 Cowen, 323; Cromie *v.* Hoover, 40 Ind. 49; Torrey *v.* Burnett, 38 N. J. 457; 20 Am. Rep. 421; Haflick *v.* Stober, 11 Ohio St. 482; Lyde *v.* Russell, 1 Barn. & Adol. 394. Compare Weeton *v.* Woodcock, 7 Mees. & W. 14; Loughran *v.* Ross, 45 N. Y. 792; 6 Am. Rep. 173.

11 Pugsley *v.* Aiken, 11 N. Y. 498.

12 Shelton *v.* Codman, 3 Cush. 318.

13 Vredenbergh *v.* Morris, 1 Johns. Cas. 223.

§ 87. Merger by union with freehold.—If a term for years becomes vested in the person who is seized of the freehold, the term merges in the freehold, and becomes extinct;[1] which is in accordance with the inflexible rule at law, that, whenever a greater and a less estate meet in the same person, without any intermediate estate, the less at once merges into the greater.[2]

1 4 Kent Com. 98; 1 Greenl. Cruise, 236; and see Cottee v. Richardson, 8 Eng. L. & Eq. 498; Doe v. Lawes, 7 Ad. & E. 195.

2 Roberts v. Jackson, 1 Wend. 478; James v. Morey, 2 Cowen, 246; 14 Am. Dec. 475; Bostwick v. Frankfield, 74 N. Y. 214; and see § 100, *post*.

§ 88. Assignment and under-lease.—A tenant for years, unless restrained by his lease, may assign over his interest, whether the term is in possession, or is to commence *in futuro*;[1] or he may underlet for so long a time as his interest continues.[2] To constitute an assignment, the entire interest of the lessee in all the premises included in the assignment must pass to the assignee.[3] If he parts with his entire interest, he has made a complete assignment; if he has transferred his entire interest in a part of the premises, he has made an assignment *pro tanto*.[4] And although the instrument may be in form a sublease, yet if it conveys the whole estate, it will operate as an assignment.[5] But if the lessee retains a reversion in himself, he has made a sublease;[6] and where he leased a part of the premises for the remainder of his term, with easements in the other part, this was held to be an under-lease, and not an assignment.[7]

1 Robinson v. Perry, 21 Ga. 183; and see Becar v. Flues, 64 N. Y. 520.

2 Pike v. Eyre, 9 Barn. & C. 909; King v. Aldborough, 1 East, 597; Jackson v. Harrison, 17 Johns. 70; Roberts v. Geis, 2 Daly, 535.

3 Van Rensselaer v. Gallup, 5 Denio, 454; Indianapolis etc. v. Cleveland etc. R. R. Co. 45 Ind. 281; McNeil v. Kendall, 128 Mass. 245; 35 Am. Rep. 373.

4 Woodhull v. Rosenthal, 61 N. Y. 391.

5 Bedford v. Terhune, 30 N. Y. 457; McNeil v. Kendall, 128 Mass. 245; 35 Am. Rep. 373; Parmenter v. Webber, 8 Taunt. 593; Langford v. Selmes, 3 Kay & J. 229.

6 Woodhull v. Rosenthal, 61 N. Y. 391; Collins v. Hasbrouck, 56 N. Y. 157; Smiley v. Van Winkle, 6 Cal. 605; Constantine v. Wake, 1 Sweeny, 239; Davis v. Morris, 36 N. Y. 569. See Martin v. O'Conner, 43 Barb. 522.

7 McNeil v. Kendall, 128 Mass. 245; 35 Am. Rep. 373. See § 101, *post*.

§ 89. Forfeiture.—At common law, the attempt by a tenant for years to create a greater interest than he has, thereby divesting the remainder or reversion, will operate as a forfeiture of his estate.[1] And if the husband is in

possession of a term, in right of his wife, and forfeits it, the forfeiture will bind the wife.[2] But a lease by a tenant for years for a longer term than he has is not a forfeiture, for the reason that, being only a contract between him and his lessee, the interests of the reversioner or remainder-man are not thereby affected.[3] So the principles on which the English law of forfeiture is founded are held to be inapplicable to our condition and circumstances in this country;[4] and the rule generally adopted is, that a conveyance by a tenant for years of a greater estate than he has passes only the title and estate which he could lawfully grant.[5] Such conveyance cannot, of course, divest a remainder or reversion, and no forfeiture is therefore incurred.[6] A tenant for years may, however, forfeit his term by a disaffirmance of his landlord's title;[7] but *mere words* can never work a forfeiture of the term;[8] and the same may be said of a mere payment of rent to a third person.[9]

1 Co. Litt. 251 *b*; 1 Greenl. Cruise, 241; and see Pollen *v.* Brewer, 7 Com. B. N. S. 371.

2 1 Rolle Abr. 851.

3 1 Greenl. Cruise, 241; Eastcourt *v.* Weeks, 1 Salk. 187.

4 De Lancey *v.* Ganong, 9 N. Y. 19; Rogers *v.* Moore, 11 Conn. 553.

5 Rogers *v.* Moore, 11 Conn. 553; Hall *v.* Benner, 1 Penr. & W. 402; 21 Am. Dec. 394; and see § 39, *ante*.

6 Rogers *v.* Moore, 11 Conn. 553; Stevens *v.* Winship, 1 Pick. 318; 11 Am. Dec. 178.

7 Jackson *v.* Vincent, 4 Wend. 633; Newman *v.* Rutter, 8 Watts, 51; Bolton *v.* Landers, 27 Cal. 104; Thayer *v.* Waples, 26 La. An. 502; Ellerbrock *v.* Flynn, 1 Cromp. M. & R. 137.

8 De Lancey *v.* Ganong, 9 N. Y. 26; Graves *v.* Wells, 10 Ad. & E. 427.

9 Dillon *v.* Parker, Gow, 180.

CHAPTER IX.

LEASE.

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§ 90. Definition.—A lease, or the contract by which an estate for years is created,[1] is defined to be a contract for the possession and profits of lands and tenements for a determinate period, with the recompense of rent or other income.[2] The person letting the land is called the lessor, or landlord; and the party to whom the lease is made the lessee, or tenant.[3] As a general rule, leases for years must be in writing;[4] and they are usually sealed as well as signed.[5] But it is well settled that a valid lease of lands for years may be made by a writing not under seal.[6] The words "demise, lease, and to farm let," are the proper ones to constitute a lease;[7] but any other words which show the intention of the parties that one shall divest himself of the possession, and the other come into it for a certain time, whatever be the form, will, in construction of law, be sufficient.[8] In construing a lease, the intention of the parties is to be gathered from the whole instrument, and from their concurrent or subsequent acts.[9] Where there are existing statutory provisions relating to the form and execution of leases, they must of course be complied with.[10]

1 See § 82, *ante*.

2 Jackson *v.* Harsen, 7 Cowen, 325; S. C. 17 Am. Dec. 517; Strong *v.* Skinner, 4 Barb. 546; Gilmore *v.* Ontario Iron Co. 22 Hun, 392. A lease properly signifies a demise or letting of land unto another for a less time than the lessor has in it: Hall *v.* Benner, 1 Penr. & W. 402; 21 Am. Dec. 394.

3 Jackson *v.* Harsen, 7 Cowen, 325; S. C. 17 Am. Dec. 517. The relation of landlord and tenant once established attaches to all who succeed to the possession, through or under the tenant, immediately

or remotely: Jackson *v.* Harsen, 7 Cowen, 325; Jackson *v.* Davis, 5 Cowen, 123; 15 Am. Dec. 451.

4 Crommelin *v.* Thiess, 31 Ala. 412; Brewer *v.* Knapp, 1 Pick. 335; Den *v.* Johnson, 15 N. J. L. 116; Allen *v.* Jaquish, 21 Wend. 635.

5 See Sharp *v.* Mayor etc. 40 Barb. 256; Stillman *v.* Harvey, 47 Conn. 26; Hunt *v.* Hazleton, 5 N. H. 216; 20 Am. Dec. 575; Kiersted *v.* Orange etc. R. R. Co. 69 N. Y. 343; S. C. 25 Am. Rep. 199.

6 University etc. *v.* Joslyn, 21 Vt. 52; Den *v.* Johnson, 15 N. J. L. 116; Nicoll *v.* Burke, 8 Abb. N. C. 213; 78 N. Y. 580.

7 Jackson *v.* Delacroix, 2 Wend. 438.

8 Jackson *v.* Delacroix, 2 Wend. 438; People *v.* Kelsey, 38 Barb. 269; Putnam *v.* Wise, 1 Hill, 234; Krider *v.* Lafferty, 1 Whart. 303; Waller *v.* Morgan, 18 Mon. B. 136; Doe *v.* Benjamin, 9 Ad. & E. 650; Bond *v.* Rosling, 1 El. B. & E. 371; Moore *v.* Miller, 8 Pa. St. 272; Weed *v.* Crocker, 13 Gray, 219.

9 People *v.* Gillis, 24 Wend. 201; Jenkins *v.* Eldredge, 3 Story, 325; Iddings *v.* Nagle, 3 Watts & S. 24; Doe *v.* Powell, 8 Scott N. R. 687; 7 Man. & G. 980. See Banker *v.* Braker, 9 Abb. N. C. 411; Osborn *v.* Farwell, 87 Ill. 89; 29 Am. Rep. 47.

10 See Richardson *v.* Bates, 8 Ohio St. 257; Anderson *v.* Critcher, 11 Gill & J. 450; Chapman *v.* Bluck, 4 Bing. N. C. 187.

§ 91. Distinction between lease and agreement to lease.—Whether an instrument produced amounts to an actual lease, or only to an agreement for a lease, is purely a question of intention, to be collected from the whole instrument.[1] If the instrument provides that a lease shall be given at a future day, it is an agreement for a lease, as contradistinguished from a present demise;[2] and this is so, although followed by actual occupation.[3] But if there be apt words of present demise, and to these is superadded a covenant for a future lease, the instrument is to be considered as a lease, and the covenant as operating in the nature of a covenant for further assurance.[4] A contract to lease must be established by competent proofs, and be clear, definite, and certain.[5]

1 Jackson *v.* Delacroix, 2 Wend. 439; Stanley *v.* Brunswick Hotel Co. 13 Me. 51; S. C. 29 Am. Dec. 485; Doe *v.* Smith, 6 East, 530; Fenner *v.* Hepburn, 2 Younge & C. 159; Gore *v.* Lloyd, 12 Mees. & W. 463.

2 Jackson *v.* Kisselbrack, 10 Johns. 336; 6 Am. Dec. 341.

3 Camden *v.* Batterbury, 5 Com. B. N. S. 896.

4 Jackson *v.* Kisselbrack, 10 Johns. 336; 6 Am. Dec. 341. Compare Thornton *v.* Payne, 5 Johns. 74; Whitney *v.* Allaire, 1 N. Y. 311; Warman *v.* Faithfull, 5 Barn. & Adol. 1042; Wright *v.* Trevezant, 3 Car. & P. 441; People *v.* Kelsey, 14 Abb. Pr. 372.

5 McIneres *v.* Hogan, 61 How. Pr. 446.

§ 92. Who may be lessors.—Any person having the capacity to enter into contracts generally may make a lease for any period not exceeding his own interest in the thing leased.[1] A lease made by an infant is not void, but only voidable;[2] and until he avoids it, the adult party will be bound thereby.[3] A lease made by a person *non compos mentis* is either absolutely void,[4] or, at least, voidable.[5] But the committee or guardian of such person is usually authorized by law to lease his property;[6] and the guardian of an infant may lease his lands for a period not exceeding his minority.[7] But a mere natural guardian has not such power.[8] At common law, the wife cannot lease her lands without her husband's concurrence;[9] but the husband has such an interest in lands owned in fee by the wife that he can give a lease thereof for a term of years, which will be valid during the coverture, at least.[10] Statutes enacted in the different States have, however, modified these rules, and under their provisions the wife may lease her lands without the concurrence of her husband.[11] An executor or administrator may be lessor of lands in which the deceased owned a term for years;[12] so trustees who have the legal fee in lands may grant leases;[13] and corporations have power to grant leases, unless specially restricted by law.[14] A tenant for life can make a lease, but not to continue beyond his own estate;[15] and a mortgagor can lease the mortgaged premises.[16] Joint tenants, coparceners, and tenants in common may lease their undivided interests, either jointly or severally.[17] A lease made by a person having no estate in the lands at the time may become good by estoppel.[18] Leases by ecclesiastical persons in England are regulated by statutes which have no force in the United States.[19]

1 2 Greenl. Cruise, 384; and see Doe v. Watts, 9 East, 19; Iseham v. Morrice, Cro. Car. 109.

2 Drake v. Ramsay, 5 Ohio, 251; Scott v. Buchanan, 11 Humph. 468; Tucker v. Moreland, 10 Peters, 71; Zouch v. Parsons, 3 Burr. 1806.

3 Bool v. Mix, 17 Wend. 119; Worcester v. Eaton, 13 Mass. 371; Wheaton v. East, 5 Yerg. 41; Kline v. Beebe, 6 Conn. 494.

4 Faulder *v.* Silk, 3 Camp. 126; Beavan *v.* M'Donnell, 9 Ex. 309; Walt *v.* Maxwell, 5 Pick. 217; Grant *v.* Thompson, 4 Conn. 203.

5 Webster *v.* Woodford, 3 Day, 90; Jackson *v.* Gumaer, 2 Cowen, 552; Peart *v.* McDowell, 3 Marsh. J. J. 658; Farnam *v.* Brooks, 9 Pick. 212; Prentice *v.* Achorn, 2 Paige, 31; Conant *v.* Jackson, 16 Vt. 335; Gore *v.* Gibson, 13 Mees. & W. 623.

6 See Knipe *v.* Palmer, 2 Wils. 136.

7 Field *v.* Schieffelin, 7 Johns. Ch. 154; Byrne *v.* Van Hoesen, 5 Johns. 66; King *v.* Oakley, 10 East, 494; Van Doren *v.* Everitt, 2 South. 460; 8 Am. Dec. 615.

8 Magruder *v.* Peter, 4 Gill & J. 323; Putnam *v.* Ritchie, 6 Paige, 390.

9 See Murray *v.* Emmons, 19 N. H. 483.

10 Eaton *v.* Whittaker, 18 Conn. 228.

11 See Elliott *v.* Gower, 12 R. I. 79; S. C. 34 Am. Rep. 600; McKesson *v.* Stanton, 50 Wis. 297; S. C. 36 Am. Rep. 850; Kronskop *v.* Shoutz, 51 Wis. 204; S. C. 37 Wis. 817; Williams *v.* Urmston, 25 Ohio St. 296; 35 Am. Rep. 611.

12 2 Greenl. Cruise, 392; compare Simpson *v.* Gutteridge, 1 Madd. 616; Bank of Hamilton *v.* Dudley, 2 Peters, 492; George *v.* Baker, 3 Allen, 326; Doe *v.* Sturges, 7 Taunt. 217.

13 Sinclair *v.* Jackson, 8 Cowen, 543; Cox *v.* Walker, 26 Me. 504; Greason *v.* Keteltas, 17 N. Y. 491; and see Malpas *v.* Ackland, 3 Russ. 273.

14 Boone Corp. §§ 40, 268.

15 Story *v.* Johnson, 2 Younge & C. 586; and see Horsey *v.* Horsey, 4 Har. (Del.) 517; Doe *v.* Morse, 1 Barn. & Adol. 365.

16 Gibson *v.* Farley, 16 Mass. 280; Hutchinson *v.* Dearing, 20 Ala. 798; Rawson *v.* Eicke, 7 Ad. & E. 451.

17 Keay *v.* Goodwin, 16 Mass. 1; Wall *v.* Hinds, 4 Gray, 256; Cowper *v.* Fletcher, 6 Best & Smith, 464.

18 Jackson *v.* Murray, 12 Johns. 201; Webb *v.* Austin, 8 Scott N. R. 419.

19 See 2 Greenl. Cruise, 385; Cheever *v.* Pearson, 16 Pick. 273.

§ 93. Who may be lessees.—Any person, even an idiot, lunatic, or drunkard, may be a lessee, because a lease is always presumed to be beneficial to the person who takes it.[1] So a married woman may hold under a lease;[2] and an infant may be a lessee, and if the use of the premises comes within the definition of a necessary, he will be bound to pay rent.[3] And by continuing in possession of the leased premises after full age he will thereby affirm the existing lease.[4]

1 2 Greenl. Cruise, 398; Co. Litt. 2 *b*. A lease executed by an agent of the lessee, in his individual name, is not binding upon the principal: Kierstead *v.* Orange etc. R. R. Co. 69 N. Y. 343; 25 Am. Rep. 199.

2 Co. Litt. 3 *a*. See Rotch *v.* Miles, 2 Conn. 638.

3 Lowe *v.* Griffith, 1 Scott, 460. A corporation may be a lessee, and

may hold as tenant from year to year: Crawford *v.* Longstreet, 43 N. J. L. 325.

4 Doe *v.* Smith, 2 Term Rep. 436; Holmes *v.* Blogg, 8 Taunt. 35.

§ 94. What may be subject of.—Lands, houses, and the like, or, in other words, corporeal hereditaments, are properly the subject of lease;[1] and some kinds of incorporeal hereditaments may also be leased.[2] Many contracts entered into in relation to interests in lands, although they do not create the technical relation of landlord and tenant, partake more or less of the character of leases of corporeal hereditaments, and the same rules are, to a great extent, applicable.[3]

1 2 Greenl. Cruise, 383. See Rooks *v.* Moore, Busb. l. A lease of a "store" includes the land under it, and to the middle of a private way in the rear, the fee of which is in the lessor. Hooper *v.* Farnsworth, 128 Mass. 487. Compare Sherman *v.* Williams, 113 Mass. 481; 18 Am. Rep. 522; Riddle *v.* Littlefield, 53 N. H. 503; 16 Am. Rep. 388; People *v.* Gedney, 10 Hun, 151; Spies *v.* Damm, 54 How. Pr. 293.

2 Davenport's Case, 8 Rep. 144; Jones *v.* Clerk, Hardin, 46; Co. Litt. 16 *b*.

3 See Smith *v.* Simons, 1 Root, 318; 1 Am. Dec. 491; Provost *v.* Calder, 2 Wend. 517; Mayor etc. *v.* Mable, 13 N. Y. 151; Croade *v.* Ingraham, 13 Pick. 33. Goods and chattels may be the subject of lease: Mickle *v.* Miles, 31 Pa. St. 20; Whitaker *v.* Hawley, 25 Kan. 674; 37 Am. Rep. 277; Webber *v.* Lee, 26 Alb. L. J. 453.

§ 95. Acceptance of.—An acceptance of the lease by the lessee is necessary in order to charge him as being bound by it.[1] But the general presumption is, that a lease is beneficial to the party who takes it,[2] and therefore an acceptance will often be presumed.[3] And it may be inferred from the acts of the lessee.[4] But where the lessor at the time of making the lease had no title, and the lessee at the same time had a perfect title to the land, this is not a beneficial lease, and acceptance will not be presumed.[5]

1 Camp *v.* Camp, 5 Conn. 299; 13 Am. Dec. 60; Jackson *v.* Dunlap, 1 Johns. Cas. 114; Hedge *v.* Drew, 12 Pick. 141; Stephens *v.* Buffalo etc. R. R. Co. 20 Barb. 338.

2 See § 93, *ante*.

3 Jackson *v.* Bodle, 20 Johns. 184; Thorne *v.* San Francisco, 4 Cal 127; Ketsey's Case, Cro. Jac. 320; Spencer *v.* Carr, 45 N. Y. 410; Merrills *v.* Swift, 18 Conn. 257.

4 See Kramer *v.* Cook, 7 Gray, 550.

5 Camp *v.* Camp, 5 Conn. 299; 13 Am. Dec. 60.

§ 96. Contract upon shares.—The decisions are very numerous to the effect that a letting of land on shares is not a lease in the technical sense, and that, as to the crops raised, the owner of the land and the cropper are merely tenants in common.[1] And this is held to be so, even where the letting is for more than a single year;[2] and although the owner of the land agrees to pay the cropper for one-half the grain produced;[3] nor is the rule changed by the use of the technical terms of a lease.[4] On the other hand, it has been held that a letting of the land for a year will constitute the relation of landlord and tenant, although the former is to receive a share of the crops for the use of the land.[5]

1 Caswell *v.* Districh, 15 Wend. 379; Bradish *v.* Schenck, 8 Johns. 152; Lowe *v.* Miller, 3 Gratt. 205; Williams *v.* Cleaver, 4 Houst. 453; Guest *v.* Opdyke, 31 N. J. L. 554; Aiken *v.* Smith, 21 Vt. 181; Williams *v.* Nolan, 34 Ala. 167; Bernel *v.* Hovious, 17 Cal. 546; Henderson *v.* Allen, 23 Cal. 521; De Mott *v.* Hagerman, 8 Cowen, 220; 18 Am. Dec. 443; Fiquet *v.* Allison, 12 Mich. 330; Harris *v.* Frink, 49 N. Y. 24; Decker *v.* Decker, 17 Hun, 13.

2 Taylor *v.* Bradley, 39 N. Y. 129, 135.

3 Wilber *v.* Sisson, 53 Barb. 258; 54 N. Y. 121; Tanner *v.* Hills, 44 Barb. 428.

4 Chandler *v.* Thurston, 10 Pick. 205; Taylor *v.* Bradley, 39 N. Y. 129, 135; Griswold *v.* Cook, 46 Conn. 198. The phrase "landlord and cropper" is familiar in Pennsylvania law: Iddings *v.* Nagle, 2 Watts. & S. 24.

5 Alwood *v.* Ruckman, 21 Ill. 200; Brown *v.* Jaquette, 94 Pa. St. 113; 39 Am. Rep. 770; Jackson *v.* Brownell, 1 Johns. 267; and compare Ross *v.* Swaringer, 9 Ired. 431; Burns *v.* Cooper, 31 Pa. St. 426; Wallis *v.* Preston, 25 Cal. 59. A mere contract for personal services, which would terminate with the death of the party occupying, is not a lease: Maverick *v.* Lewis, 3 McCord, 211. Nor does the relation of landlord and tenant arise between the parties, where one enters and occupies under a contract to purchase, and fails to pay the purchase-money: Watkins *v.* Holman, 16 Peters, 25; Tucker *v.* Adams, 52 Ala. 254. Compare Wright *v.* Roberts, 22 Wis. 161; Harris *v.* Frink, 49 N. Y. 24; 10 Am. Rep. 318. An agreement to work land on shares does not constitute a partnership: Jeter *v.* Penn, 28 La. An. 230; and see Helmstreet *v.* Howland, 5 Denio, 68; Brown *v.* Jaquette, 94 Pa. St. 113; 39 Am. Rep. 770. But compare Reynolds *v.* Pool, 84 N. C. 37; 37 Am. Rep. 607; Autrey *v.* Frieze, 60 Ala. 587.

§ 97. Perpetual lease.—Perpetual leases are valid, unless prohibited by statute,[1] and may be created by a grant in fee, reserving an annual rent, or by a lease to continue so long as the tenant shall continue to pay the rent and perform the covenants.[2] Such leases may there-

fore continue until terminated by the mutual agreement of the parties, or by the enforcement of a forfeiture.[3] In Ohio, perpetual leases are by statute regarded as real estate in respect to descent, distribution, and sales upon legal process.[4]

1 See Hart *v.* Hart, 22 Barb. 606. The constitutional prohibition of agricultural leases for a longer period than twelve years cannot be evaded by the execution of two leases at the same time and for the same consideration, one for eight and the other for twelve years, the latter to commence at the expiration of the first term. Both are void: Clark *v.* Barnes, 76 N. Y. 301; 32 Am. Rep. 306.

2 Tyler *v.* Heidorn, 46 Barb. 439; Van Rensselaer *v.* Hays, 19 N. Y. 68.

3 Folts *v.* Huntley, 7 Wend. 214; and see Lewis *v.* Effinger, 30 Pa. St. 281; Blackmore *v.* Boardman, 28 Mo. 420; Sadlier *v.* Biggs, 27 Eng. L. & Eq. 74; Willoughby *v.* Willoughby, 1 Term Rep. 763.

4 See Northern Bank *v.* Roosa, 13 Ohio, 334; Loring *v.* Melendy, 11 Ohio, 355. In many of the States, leases which are made to exceed a prescribed length of time are required to be registered: see Smith *v.* Simons, 1 Root, 318; 1 Am. Dec. 48; Brewster *v.* Hill, 1 N. H. 350; Chapman *v.* Gray, 15 Mass. 439; 1 N. Y. Rev. Stat. 761.

§ 98. Beginning of lease.—Every lease must have a certain beginning, or be capable of being made certain by reference to some event or contingency that must happen.[1] If made to begin from an impossible date, it will take effect from delivery;[2] if from an uncertain date, as where the month but not the year is mentioned, it is void.[3] Anciently, a lease commencing "from the date," or "from the day of the date," began to operate the day after the date;[4] but no general rule on the subject is now recognized, and in computing time from an act or an event, the day is to be inclusive or exclusive, according to the reason of the thing and the circumstances of the case.[5] A tenancy under a verbal lease commences from the day when the tenant takes possession under it.[6] A tenancy created by acceptance of rent from a tenant holding over will be held to commence on the same day of the year as the original lease.[7]

1 See § 84, *ante;* Child *v.* Boylle, Cro. Jac. 459; Goodright *v.* Richardson, 3 Term Rep. 462.

2 2 Greenl. Cruise, 378; Styles *v.* Wardle, 4 Barn. & C. 908; Trustees etc. *v.* Robinson, Wright, 436. A lease takes effect from the time of its delivery: De Ponde *v.* Olmsted, 5 Daly, 398.

3 2 Greenl. Cruise, 378; Moore v. Hussey, Hob. 18.

4 Co. Litt. 46 b.

5 Pugh v. Duke of Leeds, Cowp. 714; Lester v. Garland, 15 Ves. 248; Keyes v. Dearborn, 12 N. H. 52; 4 Kent Com. 95, note; Arnold v. United States, 9 Cranch, 104. And compare Blake v. Crowninshield, 9 N. H. 304; Sheets v. Selden, 2 Wall. 177, 190; Bemis v. Leonard, 118 Mass. 502; Handley v. Cunningham, 12 Bush, 401; Ackland v. Lutley, 9 Ad. & E. 879; Fox v. Nathans, 32 Conn. 348; Ordway v. Remington, 12 R. I. 319; 34 Am. Rep. 646.

6 Kemp v. Derrett, 3 Camp. 511.

7 Doe v. Samuel, 5 Esp. 174.

§ 99. Termination of tenancy.—Where there is a lease for a certain fixed period, the tenancy will terminate without notice upon the expiration of the time or the happening of the event by which it is limited.[1] Nor is notice necessary to a tenant holding over after such a tenancy without any new agreement, express or implied.[2] So, in general, if there is no tenancy in fact, and particularly if the defendant disclaims a tenancy, notice to quit is unnecessary.[3] It is generally held sufficient to put an end to the lease, if the leased premises are totally destroyed;[4] and especially in the absence of a covenant to repair.[5] And by a sale of mortgaged premises under a judgment of foreclosure, the estates of the owner of the equity of redemption, and of his lessee for years, are absolutely barred and extinguished.[6] The lessor's title being cut off by the foreclosure, the lease executed by him becomes void, and the estate of the lessee does not survive the contract by which it was created.[7]

1 Rich v. Keyser, 54 Pa. St. 86; Jackson v. Bradt, 2 Caines, 169; Chesley v. Welch, 37 Me. 106; Ackland v. Lutley, 9 Ad. & E. 879.

2 Logan v. Herron, 8 Serg. & R. 459; Allen v. Jaquish, 21 Wend. 628; Tress v. Savage, 4 El. & B. 36. But the presumption is, that a tenancy once shown to exist continues so long as the tenant remains in possession: Keane v. Cannovan, 21 Cal. 291.

3 Jackson v. French, 3 Wend. 337; 20 Am. Dec. 699.

4 Stockwell v. Hunter, 11 Met. 448; Graves v. Berdan, 29 Barb. 100; 26 N. Y. 498; Alexander v. Dorsey, 12 Ga. 12; Winton v. Cornish, 5 Ohio, 477. A lease to a corporation is not terminated by its dissolution: People v. Nat. Trust Co. 82 N. Y. 283.

5 Fowler v. Payne, 49 Miss. 32; McMillan v. Solomon, 42 Ala. 356; Ainsworth v. Ritt, 38 Cal. 89. See Austin v. Field, 1 Sheld. (N. Y.) 208.

6 Gartside v. Outley, 58 Ill. 210; Keith v. Swan, 11 Mass. 216; Duff v. Wilson, 69 Pa. St. 316.

7 Burr v. Stenton, 52 Barb. 377; 43 N. Y. 462.

§ 100. Surrender and merger.—Surrender is the yielding up of an estate, for life or years, to him who has the immediate estate in reversion or remainder, whereby the lesser estate is drowned by mutual agreement.[1] All rent not due at the time of the surrender is thereby extinguished, and can neither be distrained for nor collected by action.[2] The surrender must be made to the lessor himself, or to the party legally entitled under him;[3] and it is required by the statute of frauds to be in writing;[4] or it may be implied from some act to which the law gives that effect.[5] Thus, the acceptance of a new lease during an existing lease is a surrender by operation of law, being evidenced by writing, and hence within the intent and spirit of the statute.[6] If, however, the lease be for a term which would be good by parol, there may be a parol surrender of it.[7] And it seems that the acceptance of a new parol lease, binding within the statute of frauds, would be a surrender in law of an existing sealed lease for a term.[8] But a mere erasure, cancellation, or destruction of the lease itself is not a sufficient surrender;[9] unless done by the mutual consent of the lessor and lessee for the pupose of making a new one.[10] If the tenant agrees to purchase the premises from the grantee of his landlord, and until conveyance to pay rent, it is held to be a surrender.[11] And a presumption of a surrender arises when the term appears to have done the duty for which it was created.[12] And, in general, where, by the agreement between the lessor and lessee, the latter abandons his possession and the former resumes possession of the premises, there is a surrender by operation of law.[13] But a surrender will not be implied against the intent of the parties, as manifested by their acts; and when such intention cannot be presumed without doing violence to common sense, the presumption will not be supported.[14] Merger,[15] which in circumstances and effect nearly resembles a surrender, is confined to cases in which the tenant of the estate in reversion or remainder

grants that estate to the tenant of the particular estate, or in which the particular tenant grants his estate to him in reversion or remainder.[16] Merger is the act of the law, and its effect is to sink or drown the lesser in the greater estate.[17] It is essential to its operation, that the estate in reversion or remainder be at least as large as the preceding estate;[18] and the several estates must generally be held in the same legal right.[19] Thus, in the absence of very special circumstances, a term held by a person in his own right does not merge in the reversion held by the same person as executor or administrator.[20] In equity, merger never takes place when the requirements of justice or the intentions of the parties demand that it should not.[21]

1 Co. Litt. 337 b; Bailey *v.* Wells, 8 Wis. 158; Greider's Appeal, 5 Pa. St. 422; Coe *v.* Hobby, 72 N. Y. 141; 28 Am. Rep. 120.

2 Greider's Appeal, 5 Pa. St. 422; Bain *v.* Clark, 10 Johns. 422; Curtiss *v.* Miller, 17 Barb. 479; Grimman *v.* Legge, 8 Barn. & C. 332.

3 Cornish *v.* Searell, 1 Moo. & Ry. 703; 8 Best & Smith, 471; and compare Nelson *v.* Thompson, 23 Minn. 508.

4 Jackson *v.* Gardner, 8 Johns. 404; Doe *v.* Thomas, 4 Moo. & Ry. 218; 9 Best & Smith, 288. Any form of words sufficiently indicating the intention of the parties will operate as a surrender: Smith *v.* Mapleback, 1 Term Rep. 441.

5 Farmer *v.* Rogers, 2 Wils. 26; Hesseltine *v.* Seavey, 16 Me. 212; McDonnell *v.* Pope, 9 Hare, 705.

6 Roe *v.* Archbishop etc. 6 East, 86; Farmer *v.* Rogers, 2 Wils. 27; and see Livingston *v.* Potts, 16 Johns. 28; Abell *v.* Williams, 3 Daly, 17.

7 Kiester *v.* Miller, 25 Pa. St. 481.

8 Smith *v.* Niver, 2 Barb. 180; Coe *v.* Hobby, 72 N. Y. 141; 28 Am. Rep. 120. In New York, an oral agreement for a term longer than a year will not operate as a surrender of an existing written lease: Coe *v.* Hobby, 72 N. Y. 141; 28 Am. Rep. 120.

9 Ward *v.* Lumley, 5 Hurl. & N. 88; and see Roe *v.* Conway, 74 N. Y. 201.

10 Baker *v.* Pratt, 15 Ill. 568.

11 Denison *v.* Wertz, 7 Serg. & R. 372.

12 Bartlett *v.* Downes, 3 Best & Smith, 616; 5 Dowl. & R. 526.

13 Bedford *v.* Terhune, 30 N. Y. 453; Coe *v.* Hobby, 72 N. Y. 141; 28 Am. Rep. 120; Amory *v.* Kannoffsky, 117 Mass. 351; 19 Am. Rep. 416; Pheno *v.* Popplewell, 12 Com. B. N. S. 334; Clemens *v.* Broomfield, 19 Mo. 118; Witman *v.* Watry, 31 Wis. 638; Mackeller *v.* Sigler, 47 How. Pr. 20; Thomas *v.* Cook, 2 Barn. & Ald. 119; Davison *v.* Gent, 1 Hurl. & N. 744; Dodd *v.* Acklom, 6 Man. & G. 672; Beall *v.* White, 94 U. S. 382.

14 Van Rensselaer *v.* Penniman, 6 Wend. 569; Coe *v.* Hobby, 72 N. Y. 141; 28 Am. Rep. 120. But compare Lyon *v.* Reed, 13 Mees. & W. 306.

15 See § 87, *ante*.

16 3 Prest. Convey. 25; 4 Kent Com. 100. Compare Smiley *v.* Van Winkle, 6 Cal. 605; Elliott *v.* Aiken, 45 N. H. 30; Wilson *v.* Gibbs, 28 Pa. St. 151; Bostwick *v.* Frankfield, 74 N. Y. 214.

17 James *v.* Morey, 2 Cowen, 246; 14 Am. Dec. 475; Mason *v.* Lord, 40 N. Y. 489; Bostwick *v.* Frankfield, 74 N. Y. 207; Liebschutz *v.* Moore, 70 Ind. 142; 36 Am. Rep. 182.

18 Doe *v.* Walker, 5 Barn. & C. 111. Compare Smiley *v.* Van Winkle, 6 Cal. 605; Strout *v.* Natoma etc. 9 Cal. 78.

19 Jones *v.* Davies, 5 Hurl. & N. 766; Donisthorpe *v.* Porter, 2 Eden, 162. Compare Low *v.* Purdy, 2 Lans. 422; Bostwick *v.* Frankfield, 74 N. Y. 214.

20 Chambers *v.* Kingham, Law R. 10 Ch. Div. 743; 27 Eng. R. 248. Compare Case *v.* Carroll, 35 N. Y. 385; Clift *v.* White, 12 N. Y. 519.

21 Payne *v.* Wilson, 74 N. Y. 348; White *v.* Leslie, 54 How. Pr. 335; Andrus *v.* Vreeland, 29 N. J. Eq. 394; Dunphy *v.* Riddle, 86 Ill. 22.

§ 101. Assignment of.—Every lease for a term of years may be assigned, unless its assignability is restricted by some provision therein.[1] If the lease is required by the statute of frauds to be by deed or in writing, an assignment of it must be by an instrument of as high a character.[2] No set form of words is, however, essential to effect the transfer, provided only that the intention of the parties be sufficiently shown;[3] nor need a consideration be expressed.[4] The grant of his entire estate by a lessee amounts to an assignment of the lease, whether the instrument be in form a lease or in terms an assignment.[5] By the sale of a term on execution, the purchaser is made an assignee.[6] At common law, on the marriage of a female lessee, the term is transferred by operation of law to her husband.[7] On the death of a lessee, his executor or administrator is liable as assignee of the leasehold estate.[8] In an action by a lessor to recover rent reserved in a lease against one in possession of demised premises, a *prima facie* right to recover is established by showing him to have been in actual possession at the time the rent became due, and the presumption of law then attaches that he was in as assignee of the original lessee.[9] But this presumption may be rebutted, and the party exonerated from liability to the lessor, by showing that he was not assignee in fact, and had no interest in the lease, but occupied by permission

of the lessee as under-tenant or otherwise.[10] A lessee remains liable on his express agreement to pay rent, notwithstanding he may have assigned his lease with the lessor's assent,[11] and the lessor has accepted rent from the assignee.[12] But where the obligation of the lessee to pay rent is only that which is implied by law from his occupation of the premises, his assignment of the lease and surrender of possession to the assignee, with the assent of the lessor, extinguishes the privity of estate between the lessor and lessee, and the consequent implied liability of the lessee to pay rent.[13] And the assent of the lessor to such assignment, in the absence of anything appearing to the contrary, may be implied from his charging the rent to the new tenant and accepting payment thereof from him.[14] A tenant for years has a right to underlet for so long as his interest continues, unless restrained therefrom by some covenant or condition in the lease.[15] There is no privity of estate between the original lessor and the sublessee, and the latter is not liable to the former for the rent reserved in the first lease;[16] he is liable only to his immediate lessor for the payment of rent and the performance of covenants.[17]

1 See § 88, *ante;* Cooney *v.* Hayes, 40 Vt. 478; Holland *v.* Cole, 1 Hurl. & C. 67; Roosevelt *v.* Hopkins, 33 N. Y. 81; King *v.* Lawson, 98 Mass. 309; Roberts *v.* Geis, 2 Daly, 535; Mason *v.* Corder, 7 Taunt. 9.

2 Hess *v.* Fox, 10 Wend. 437; Brewer *v.* Dyer, 7 Cush. 337; Bridgham *v.* Tileston, 5 Allen, 371; and see Standen *v.* Chrismas, 10 Q. B. 135; Bolting *v.* Martin, 1 Camp. 318.

3 Parmenter *v.* Webber, 8 Taunt. 593.

4 Peabody *v.* Fenton, 3 Barb. Ch. 451; and see Tate *v.* McCormick, 23 Hun, 221; Richardson *v.* Mead, 27 Barb. 178; Euo *v.* Crook, 10 N. Y. 60.

5 See 1 Washb. Real Prop. 336; Van Rensselaer *v.* Gallup, 5 Denio, 454; Lynde *v.* Rough, 27 Barb. 415; Woodhull *v.* Rosenthal, 61 N. Y. 383. If a single day is reserved, it will be a sublease, and not an assignment: Davis *v.* Morris, 36 N. Y. 569; and see Collins *v.* Hasbrouck, 56 N. Y. 157.

6 Doe *v.* Jones, 9 Mees. & W. 372; Taylor *v.* Cole, 3 Term Rep. 292.

7 Co. Litt. 44 *b*.

8 Tremeere *v.* Morison, 1 Bing. N. C. 89; James *v.* Dean, 11 Ves. 393.

9 Williams *v.* Woodward, 2 Wend. 487; Armstrong *v.* Wheeler, 9 Cowen, 88; Kain *v.* Hoxie, 2 Hilt. 516.

10 Kain *v.* Hoxie, 2 Hilt. 516; Quackenboss *v.* Clarke, 12 Wend. 555; Holford *v.* Hatch, 1 Doug. 183.

11 Fletcher *v.* McFarlane, 12 Mass. 43; Gordon *v.* George, 12 Ind. 403; Port *v.* Jackson, 17 Johns. 239; House *v.* Burr, 24 Barb. 525; Smyth *v.* North, Law R. 7 Ex. 242.

12 Sutliff *v.* Atwood, 15 Ohio St. 194; Taylor *v.* De Bus, 31 Ohio St. 463; Lodge *v.* White, 30 Ohio St. 569; 27 Am. Rep. 492.

13 Lodge *v.* White, 30 Ohio St. 569; 27 Am. Rep. 492; Moale *v.* Tyson, 2 Har. & M. 387; Harvey *v.* McGrew, 44 Tex. 412; Tate *v.* McCormick, 23 Hun, 220, 221.

14 Lodge *v.* White, 30 Ohio St. 569; 27 Am. Rep. 492.

15 See § 88, *ante*; Jackson *v.* Harrison, 17 Johns. 66; King *v.* Aldborough, 1 East, 597; Den *v.* Post, 25 N. J. L. 285.

16 Jennings *v.* Alexander, 1 Hilt. 154; Dartmouth College *v.* Clough, 8 N. H. 22; McFarlan *v.* Watson, 3 N. Y. 286; Arnsby *v.* Woodward, 9 Dowl. & R. 536. Compare Peck *v.* Ingersoll, 7 N. Y. 528.

17 Harvey *v.* McGrew, 44 Tex. 412.

§ 102. Conditions.—Conditions are qualifications annexed to the estate of the lessee, whereby it may be defeated or avoided.[1] They are more favored by the law than those which tend to defeat a freehold estate, and especially alienation may be prohibited on pain of forfeiture.[2] But the courts are strict in construing conditions which work a forfeiture, and a condition not to assign is not deemed to be broken by under-letting the premises;[3] nor is an assignment of the entire term within a condition not to let or under-let.[4] So if a lease is made to one and his *assigns*, a condition against assignment is repugnant and void.[5] But the lessor may annex any condition he pleases at the time of the grant, provided it is not illegal, unreasonable, or against public policy.[6] Conditions against under-letting or assigning the demised premises without the lessor's consent are inserted solely for his benefit, and can only be taken advantage of, if broken, by him or his assigns.[7] And an actual entry should be made for condition broken, in order to complete the forfeiture and defeat the lease.[8] If the lessee be released from the performance of a part of a condition annexed to the grant, the whole condition is gone, and the estate is held free and discharged of the condition.[9] A condition not to assign is not broken so as to operate as a forfeiture where it is done *in invitum*, as by a decree in bankruptcy,[10] unless an express condition

provides that such an act of assignment shall work a forfeiture.[11]

1 See Doe v. Bancks, 4 Barn. & Ald. 401; Reid v. Parsons, 2 Chit. 247; Jones v. Carter, 15 Mees. & W. 718; Clark v. Jones, 1 Denio, 518; Brown v. Bragg, 22 Ind. 122.

2 Burt. Real Prop. § 852; Lloyd v. Crispe, 5 Taunt. 249; Cartwright v. Gardner, 5 Cush. 281.

3 See Crusoe v. Bugby, 3 Wils. 234; Doe v. Smith, 5 Taunt. 795; Spear v. Fuller, 8 N. H. 174; Hargrave v. King, 5 Ired. Eq. 430; McKildoe v. Darracott, 13 Gratt. 273; Den v. Post, 25 N. J. L. 235. An assignment of a lease made for the purpose of defrauding creditors of the assignor, though void as to such creditors, is sufficient to work a forfeiture of the lease under a covenant not to sell or assign: Moore v. Pitts, 53 N. Y. 85.

4 Lynde v. Hough, 27 Barb. 415. But compare Greenaway v. Adams, 12 Ves. 400; Den v. Post, 25 N. J. L. 235.

5 Burt. Real Prop. § 852. An agreement that all "usual covenants" should be inserted in a proposed lease does not include a covenant against assignment: Buckland v. Papillon, Law R. 1 Eq. 477.

6 Berry v. Taunton, Cro. Eliz. 231; Roe v. Galliers, 2 Term Rep. 138; Pennant's Case, 3 Rep. 64.

7 Shumway v. Collins, 6 Gray, 227. Compare Collins v. Hasbrouck, 56 N. Y. 157; 15 Am. Rep. 407.

8 Doe v. Birch, 1 Mees. & W. 402; Jones v. Carter, 15 Mees. & W. 718; Fifty Associates v. Howland, 11 Met. 99; Garner v. Hannah, 6 Duer, 262. To create a good condition upon which a term granted by a lease shall end before it expires by lapse of time, a right to re-enter on breach must be expressly reserved: Dennison v. Reed, 3 Dana, 586; Vanatta v. Brewer, 32 N. J. Eq. 268.

9 Dakin v. Williams, 17 Wend. 447; and see Bleecker v. Smith, 13 Wend. 530; Cartwright v. Gardner, 5 Cush. 281; McKildoe v. Darracott, 13 Gratt. 278; Chipman v. Emeric, 5 Cal. 49; Dickey v. McCullough, 2 Watts & S. 88; Doe v. Bliss, 4 Taunt. 735.

10 Mitcherson v. Hewson, 8 Term Rep. 57; Yarnold v. Moorehouse, 1 Russ. & M. 364; Jackson v. Corlis, 7 Johns. 531.

11 Burt. Real Prop. § 854; Lear v. Leggett, 1 Russ. & M. 690.

§ 103. Covenants.—Covenants in a lease are either such as are inserted in express terms, or are incident to the relation of lessor and lessee, and therefore to be implied.[1] The latter are known as "usual covenants," which may be exacted independently of positive stipulation;[2] as, for instance, a covenant that the lessor will protect the lessee in the quiet enjoyment of the premises for the term of the lease.[3] It is an implied undertaking on the part of the grantor that, so far as he is concerned, he will do no act to interrupt the free and peaceable enjoyment of the thing granted.[4] But he does not warrant

against mere trespassers, nor agree to put the lessee into possession.[5] The covenant is, however, held to be broken if the lessee is prevented from entering by a person who had title at the date of the lease.[6] Where there is an express covenant for quiet enjoyment, none other of the same character will be implied.[7] The obligation of a landlord to repair demised premises rests solely upon express contract, and a covenant to repair will not be implied.[8] If the leased premises should be destroyed by fire, the landlord cannot be compelled to rebuild or repair for the benefit of the tenant, unless he has expressly covenanted to do so;[9] nor will an express covenant be enlarged by construction.[10] There is no implied covenant in a lease of a building for a particular use, that it is suitable for that use, or that it is safe and well built;[11] nor in a lease of a dwelling, that it is fit for habitation.[12] But a lessor may bind himself by express covenant to repair the premises, and if there be a reservation in the lease of a right to enter and make improvements, he is bound to make the necessary repairs without notice so to do.[13] If he fails to make the repairs, the lessee is not thereby released from paying rent, nor is he justified in abandoning possession of the premises, but he may sue for a breach of the covenant to repair.[14] A covenant to make "all necessary repairs" binds the landlord to restore the premises to their original condition as it regards fitness for the business for which they were leased.[15] The lessor is not bound to pay for improvements made by the lessee during his term, in the absence of an express agreement so to do.[16] But the payment of all taxes and assessments upon the premises is usually imposed by law on the lessor.[17] A covenant for the renewal of a lease, to be valid, must be reasonably definite and certain, both as to the term and amount of rent.[18] A covenant on the part of the lessor for a new lease at the expiration of the term, without a corresponding covenant on the part of the lessee to accept it, does not bind the lessee to accept.[19] Covenants

for continued renewals are not favored, for the reason that they tend to create perpetuities;[20] but where their validity is recognized, they will be specifically enforced, if clearly expressed.[21] A lease of premises used by a firm for copartnership purposes, made to one of the copartners, does not authorize him to renew the same for his use only, but the renewal inures to the benefit of the firm.[22] A covenant to renew at the option of the lessee makes it necessary for him to declare his election before the expiration of his current term.[23] On the part of the lessee, there are likewise implied covenants, such as to pay rent,[24] to make tenantable repairs, and to use the premises in a proper and tenant-like manner.[25] The words "yielding and paying" a stipulated sum will raise a covenant to pay rent.[26] The liability of a tenant to repair is usually fixed by express covenant, which, if general, merely binds him to see that the tenement does not suffer greater injury than the usual operations of nature will cause to a building of its age and condition.[27] An express and unconditional covenant to repair and keep in repair binds him to rebuild in case of destruction by fire or other accident.[28] And an exception in a covenant to repair, of damages by the elements or the act of God, will not include damages to which human agency in any way contributed.[29] But a lessee of a wooden building, covenanting to re-build in case of fire, is released by the enactment of a valid ordinance prohibiting the erection of a wooden building.[30] The lessee may bind himself by covenant to pay taxes, assessments, or other charges on the property;[31] but his liability in such case must not be extended beyond the reasonable meaning of the terms employed.[32] A covenant to pay taxes runs with the land, and binds the assignees of the term.[33] So of a covenant to insure,[34] to reside on the premises,[35] to repair, or to deliver up in good condition.[36] Covenants for quiet enjoyment,[37] to pay rent,[38] and implied covenants generally, are likewise of this character.[39] But an assignee cannot

be held liable for breaches of covenant committed before he became such.[40]

1 See Hamilton v. Wright, 28 Mo. 199; Mayor etc. v. Mabie, 13 N. Y. 160; Tone v. Brace, 8 Paige, 577; Ross v. Dysart, 33 Pa. St. 452; Surplice v. Farnsworth, 7 Man. & G. 584; Bishop of St. Albans v. Battersby, L. R. 3 Q. B. Div. 359; 23 Eng. R. 314; Williams v. Burrell, 1 Com. B. 429. A breach of the covenants of a lease does not work a forfeiture of the term, in the absence of a stipulation to that effect: Vanatta v. Brewer, 32 N. J. Eq. 268.

2 Wilkins v. Fry, 2 Swanst. 249; Bennett v. Womack, 7 Barn. & C. 627; Hodgkinson v. Crowe, Law R. 10 Ch. 622; 14 Eng. R. 823; Clark v. Clark, 49 Cal. 586. Where a lease is drawn technically in form, and with obvious attention to details, a covenant cannot be implied in the absence of language tending to a conclusion that the covenant sought to be set up was intended: Bruce v. Fulton Nat. Bank, 16 Hun, 615; 79 N. Y. 154; 35 Am. Rep. 605.

3 Eldred v. Leahy, 31 Wis. 546; Edwards v. Perkins, 7 Oreg. 149; Mack v. Patchin, 42 N. Y. 167; 1 Am. Rep. 506; Berrington v. Casey, 73 Ill. 317; Bandy v. Cartwright, 8 Ex. 913.

4 Dexter v. Manley, 4 Cush. 24; Wells v. Mason, 4 Scam. 84; Baugher v. Wilkins, 16 Md. 35; Coddington v. Dunham, 45 How. Pr. 40.

5 Playter v. Cunningham, 21 Cal. 229; Mechanics' etc. Ins. Co. v. Scott, 2 Hilt. 550; Grist v. Hodges, 3 Dev. 200; Moore v. Weber, 71 Pa. St. 429; 10 Am. Rep. 703.

6 Stott v. Rutherford, 92 U. S. 107; Grannis v. Clark, 8 Cowen, 36. But compare Gano v. Vanderveer, 34 N. J. L. 293.

7 Burr v. Stenton, 43 N. Y. 462.

8 Clancy v. Byrne, 56 N. Y. 129; Morse v. Maddox, 17 Mo. 569; Kramer v. Cook, 7 Gray, 553; Arden v. Pullen, 10 Mees. & W. 321; Sauer v. Bilton, 7 Ch. Div. 815; 25 Eng. R. 34; McAlpin v. Powell, 70 N. Y. 126; 26 Am. Rep. 555.

9 Doupe v. Genin, 45 N. Y. 119; Beach v. Farish, 4 Cal. 339; Cowell v. Lumley, 39 Cal. 151; 2 Am. Rep. 430; Sheets v. Selden, 7 Wall. 423. Equity will not enforce the specific performance of a covenant in a lease, on the part of the lessor, to repair damages by fire: Beck v. Allison, 56 N. Y. 336; 15 Am. Rep. 430.

10 Witty v. Matthews, 52 N. Y. 512; Mills v. Baehr, 24 Wend. 254.

11 Libbey v. Tolford, 48 Me. 316; Jaffe v. Harteau, 56 N. Y. 398; 15 Am. Rep. 433; and see Clark v. Babcock, 23 Mich. 164. Where the owner of real property has made a complete surrender of the premises to a lessee, and there is no fraud, or contract to repair, he is not liable for injuries resulting from defects therein to persons induced to visit them by the lessee: Edwards v. New York etc. R. R. Co. 25 Hun, 635.

12 Foster v. Peyser, 9 Cush. 242.

13 Allen v. Culver, 3 Denio, 284; Hayden v. Bradley, 6 Gray, 425. Compare Makin v. Watkinson, 6 Law J. Ex. 25; 40 Law J. Ex. 33.

14 Spickels v. Sax, 1 Smith, E. D. 253; Tibbetts v. Percy, 24 Barb. 39; and see Cowell v. Lumley, 39 Cal. 151; 2 Am. Rep. 430; Wall v. Hinds, 4 Gray, 256; Welles v. Castles, 3 Gray, 325.

15 Ward v. Kelsey, 38 N. Y. 80; and see Flynn v. Hatton, 4 Daly, 552; 45 How. Pr. 333.

16 Howard v. Doolittle, 3 Duer, 464; Mumford v. Brown, 6 Cowen, 475; Weigall v. Waters, 6 Term Rep. 488. See Connor v. Jones, 28 Cal. 59; Van Cortlandt v. Underhill, 17 Johns. 405.

17 Dawson *v.* Linton, 5 Barn. & Ald. 521; Jones *v.* Morris, 3 Ex. 742.

18 Cunningham *v.* Pattee, 99 Mass. 248; Pray *v.* Clark, 113 Mass. 283; Brown *v.* Parsons, 22 Mich. 24; Arnst *v.* Alexander, 44 Mo. 25; Norton *v.* Snyder, 2 Hun, 82.

19 Bruce *v.* Fulton Nat. Bank, 79 N. Y. 154; 35 Am. Rep. 505.

20 Baynham *v.* Guy's Hospital, 3 Ves. 295; Att.-Gen. *v.* Brooke, 18 Ves. 326; Rutgers *v.* Hunter, 6 Johns. Ch. 215; Banker *v.* Braker, 9 Abb. N. C. 411. See § 97, *ante*.

21 Willan *v.* Willan, 16 Ves. 84; Whitlock *v.* Duffield, 1 Hoff. Ch. 110; Blackmore *v.* Boardman, 23 Mo. 420.

22 Mitchell *v.* Read, 84 N. Y. 556.

23 Renoud *v.* Daskam, 34 Conn. 512; Thiebaud *v.* National Bank, 42 Ind. 212. Compare Reed *v.* St. John, 2 Daly, 213.

24 Van Rensselaer *v.* Smith, 27 Barb. 140; Lynch *v.* Onondaga Salt Co. 64 Barb. 555; Kimpton *v.* Walker, 9 Vt. 195.

25 Lynch *v.* Onondaga Salt Co. 64 Barb. 558; Nave *v.* Berry, 22 Ala. 382. In a parol demise there is an implied contract on the part of the tenant that at the expiration of the tenancy he will deliver up vacant possession of the premises to the landlord: Henderson *v.* Squire, 10 Best & Smith, 183.

26 Iggulden *v.* May, 9 Ves. 330; Wolveridge *v.* Steward, 3 Tyrw. 687; 1 Cromp. & M. 644; Van Rensselaer *v.* Smith, 27 Barb. 140.

27 Gutteridge *v.* Munyard, 7 Car. & P. 129; Stanley *v.* Twogood, 3 Bing. N. C. 4.

28 Ross *v.* Overton, 3 Call, 309; 2 Am. Dec. 552; Scott *v.* Scott, 18 Gratt. 166; Schmidt *v.* Pettit, 1 McAr. 179; Abby *v.* Billups, 35 Miss. 618; Hoy *v.* Holt, 91 Pa. St. 88; 36 Am. Rep. 659; Monk *v.* Noyes, 1 Car. & P. 265.

29 Polack *v.* Ploche, 35 Cal. 416.

30 Cordes *v.* Miller, 39 Mich. 581; 33 Am. Rep. 430.

31 Trinity Church *v.* Higgins, 48 N. Y. 532. Compare Sapsford *v.* Fletcher, 4 Term Rep. 511; Garner *v.* Hannah, 6 Duer, 262; Paul *v.* Chickering, 117 Mass. 265; Wall *v.* Hinds, 4 Gray, 256.

32 Love *v.* Howard, 6 R. I. 116; Codman *v.* Johnson, 104 Mass. 491; Shepardson *v.* Elmore, 19 Wis. 424; Jeffrey *v.* Neale, Law R. 6 C. P. 240.

33 Post *v.* Kearney, 1 Sand. 105; 2 N. Y. 394; Astor *v.* Miller, 2 Paige, 68.

34 Doe *v.* Peek, 1 Barn. & Adol. 428.

35 Doe *v.* Lockwood, 8 East, 185; Tatem *v.* Chaplin, 2 Black. H. 133.

36 Dean of Windsor's Case, 5 Rep. 24; Demorest *v.* Willard, 8 Cowen, 206.

37 Markland *v.* Crump, 1 Dev. & B. 94; Shelton *v.* Codman, 3 Cush. 318.

38 Graves *v.* Porter, 11 Barb. 592; Jacques *v.* Short, 20 Barb. 269; Hurst *v.* Rodney, 1 Wash. C. C. 375; Howland *v.* Coffin, 12 Pick. 125. See also Noonan *v.* Orton, 4 Wis. 342; Hunt *v.* Danforth, 2 Curt. 592.

39 See Fletcher *v.* McFarlane, 12 Mass. 43; Harvey *v.* McGrew, 44 Tex. 412; Smyth *v.* North, Law R. 7 Ex. 242.

40 Paul *v.* Nurse, 8 Barn. & C. 486; Cuthbertson *v.* Irving, 4 Hurl. & N. 742; Harley *v.* King, 2 Cromp. M. & R. 22; Johnson *v.* Sherman, 15 Cal. 287; Kain *v.* Hoxie, 2 Hilt. 311; Hintze *v.* Thomas, 7 Md. 346; Patten *v.* Deshon, 1 Gray, 329.

§ 104. Estoppel.—It is a firmly established general rule that the tenant shall not dispute the title of his landlord, or of any one who succeeds to his rights;[1] and the rule extends to privies in blood or estate of the lessee.[2] The rule is not, however, universal in its application, and does not apply where the acceptance of the lease was induced by fraud,[3] misrepresentation,[4] or duress;[5] nor where the acceptance occurred through mistake on the part of the lessee.[6] So the lessee may show that the relation has been dissolved, and may then controvert the landlord's title.[7] And where the landlord's title is judicially pronounced insufficient for the tenant's security, the latter may renounce the relation, and take shelter under the paramount title.[8] And the doctrine is laid down in the California decisions, that one in possession accepting a lease from one who did not put him in possession is not estopped to dispute the title of such lessor.[9] The estoppel of the tenant to dispute his landlord's title continues while he remains in possession, even after his lease has expired, if there is no disclaimer or attornment to another.[10] In the absence of a written lease, estoppel of the tenant arises from his possession, and the consequent benefit to him therefrom.[11]

1 Bertram *v.* Cook, 32 Mich. 518; Arnold *v.* Woodard, 4 Cold. 249; Rogers *v.* Boynton, 57 Ala. 501; Savings Bank *v.* Phalen, 12 R. I. 405; Brahm *v.* Jersey City Forge Co. 38 N. J. L. 74; Mattis *v.* Robinson, 1 Neb. 3; Brenner *v.* Bigelow, 8 Kan. 497; Frazer *v.* Robinson, 42 Miss. 121; Clarke *v.* Clarke, 51 Ala. 495; Cook *v.* Creswell, 44 Md. 581; Delaney *v.* Fox, 2 Com. B. N. S. 768; Balls *v.* Westwood, 2 Camp. 11; Stott *v.* Rutherford, 92 U. S. 107. One who has paid rent for land claimed by the lessor, and has peaceably and undisturbedly enjoyed the full term, cannot recover that rent from the lessor, although the lessor has been ejected, or has voluntarily surrendered to a superior title: Dwinell *v.* Brown, 65 Ga. 438; 38 Am. Rep. 792.

2 Lewis *v.* Adams, 61 Ga. 559; Ronaldson *v.* Tabor, 43 Ga. 230; Rose *v.* Davis, 11 Cal. 135; Earle *v.* Hale, 31 Ark. 470; Hardy *v.* Akerly, 57 Barb. 148; Jones *v.* Dove, 7 Oreg. 467; Bedford *v.* Kelly, 61 Pa. St. 491.

3 Alderson *v.* Miller, 15 Gratt. 279; Pentz *v.* Kuester, 41 Mo. 447; Miller *v.* McBrier, 14 Serg. & R. 382.

4 Evans *v.* Bidwell, 76 Pa. St. 497; Baskin *v.* Seechrist, 6 Pa. St. 163; Gleim *v.* Rise, 6 Watts, 44.

5 Brown *v.* Dysinger, 1 Rawle, 408; Gravenor *v.* Woodhouse, 1 Bing. 38.

6 Swift v. Dean, 11 Vt. 323; De Wolf v. Martin, 12 R. I. 533; Jackson v. Cuerden, 2 Johns. Cas. 353.

7 Bigler v. Furman, 58 Barb. 545; Camp v. Camp, 5 Conn. 291; S. C. 13 Am. Dec. 60; Wild v. Serpell, 10 Gratt. 415; Langford v. Selmes, 3 Kay & J. 220; Franklin v. Carter, 1 Com. B. 757; Giles v. Ebsworth, 10 Md. 333; and see Lamson v. Clarkson, 113 Mass. 348; 18 Am. Rep. 498.

8 Lunsford v. Turner, 5 Marsh. J. J. 104; S. C. 20 Am. Dec. 248; Delaney v. Fox, 2 Com. B. N. S. 168; and see Wolf v. Johnson, 30 Miss. 513. The doctrine of estoppel has no application to the relation of landlord and tenant constructively existing between the holder of the legal title to land and one in possession: Baker v. Hale, 6 Baxt. (Tenn.) 46.

9 Tewksbury v. Magraff, 33 Cal. 237; Franklin v. Merida, 35 Cal. 558; 13 Am. Dec. 69, note; and see Peralta v. Ginochio, 47 Cal. 459; Halloway v. Galliac, 47 Cal. 474; and see Cornish v. Searell, 8 Barn. & C. 471; Shelton v. Carrol, 16 Ala. 148.

10 Zeller v. Eckert, 4 How. 235; Miller v. Lang, 99 Mass. 13. Compare Accidental Death Ins. Co. v. Mackenzie, 10 Com. B. N. S. 870.

11 Fuller v. Sweet, 30 Mich. 237; 18 Am. Rep. 122. After the estate has become vested in the tenant, he is not estopped to deny the landlord's title under which the tenancy began: Ryder v. Mansell, 66 Me. 167.

§ 105. Validity.—A lease founded on an illegal or immoral consideration is regarded as so tainted that an action cannot be maintained thereon.[1] And such lease has been held to be void;[2] but not so as to affect an under-lessee not concerned in such consideration.[3] And where a lease made for an immoral purpose is by statute declared to be void,[4] it is held that the mere knowledge that the lessee would use the premises in violation of the statute is not sufficient to avoid the lease, unless the lessor was a party to such intent, and did some act in aid and furtherance of the intended violation of the law.[5] A lease for the life of a person not in existence is void by reason of indefiniteness;[6] but a lease for the lives of several persons named is valid for the lives of such of them then living.[7] A grant of the possession of land for any permanent use is, except for short terms,[8] required by the statute of frauds to be in writing;[9] and where the lease itself is required to be in writing, a subsequent verbal agreement to add a restrictive clause is void.[10] But it is otherwise as it respects such an agreement to do some collateral thing relative to the demised premises.[11] A lease must describe the premises intended to be de-

mised with reasonable certainty, and if defective in this respect it is void.[12]

1 Girardy v. Richardson, 1 Esp. 13; Smith v. White, Law R. 1 Eq. 626; Dyett v. Pendleton, 8 Cowen, 727.

2 Molloy v. Irwin, 1 Schoales & L. 310. See Hinde v. Gray, 1 Man. & G. 195; 1 Scott N. R. 123; Kellogg v. Larkin, 3 Chand. 133.

3 Molloy v. Irwin, 1 Schoales & L. 310.

4 See Gibson v. Pearsall, 1 Smith, E. D. 90; Edelmurth v. McGarren, 45 How. Pr. 192.

5 Updike v. Campbell, 4 Smith, E. D. 570, 582.

6 Doe v. Edwards, 1 Mees. & W. 553.

7 Doe v. Edwards, 1 Mees. & W. 553.

8 See Bradley v. Covell, 4 Cowen, 350; Porker v. Hollis, 50 Ala. 411; Beale v. Sanders, 3 Bing. N. C. 850.

9 Allen v. Jaquish, 21 Wend. 635; Cook v. Stearns, 11 Mass. 533; Brumfield v. Carson, 33 Ind. 94; 5 Am. Rep. 184.

10 Snelling v. Thomas, Law R. 17 Eq. 303; 7 Eng. 820. Compare Horgan v. Krumwiede, 12 N. Y. Week. Dig. 549.

11 Angell v. Duke, Law R. 10 Q. B. 174; 12 Eng. 236; and see Wilgus v. Whitehead, 69 Pa. St. 131.

12 Dingman v. Kelly, 7 Ind. 717; Pierce v. Minturn, 1 Cal. 470; Spencer v. Babcock, 22 Barb. 326.

CHAPTER X.

RENT.

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§ 111. Lien to secure payment of.
§ 112. Apportioning rents.

§ 106. Definition.—Rent, which is an important incident of an estate for years and a lease, is defined to be a periodical return made by the tenant, either in labor, money, or provisions, in retribution for the land that passes.[1] It is, in effect, the price or purchase-money to be paid for the ownership of the premises during the term.[2] A rent must be certain, or that which is capable of being reduced to a certainty by either party.[3] And at common law, it must issue out of the thing granted, and

not be a part of the land or thing itself.[4] It is frequently reserved, however, in a certain portion of the products,[5] and may also be reserved in labor as well as produce.[6]

1 2 Greenl. Cruise, 72; Co. Litt. 142 *a*; McGee *v.* Gibson, 1 Mon. B. 105.

2 Fowler *v.* Bott, 6 Mass. 67; Stone *v.* Patterson, 19 Pick. 476.

3 2 Greenl. Cruise, 72; Smith *v.* Tyler, 2 Hill, 648; Cross *v.* Tome, 14 Md. 247; Bowzer *v.* Scott, 8 Blackf. 36; Smith *v.* Colson, 10 Johns. 91; Dutcher *v.* Culver, 24 Minn. 548.

4 2 Greenl. Cruise, 72; Co. Litt. 47. Compare Buzzard *v.* Capel, 8 Barn. & C. 141; Mickle *v.* Miles, 31 Pa. St. 20.

5 See Ream *v.* Harnish, 45 Pa. St. 376; Butterfield *v.* Baker, 5 Pick. 522; Kier *v.* Peterson, 41 Pa. St. 357; Smalley *v.* Corliss, 37 Vt. 486; Buskirk *v.* Cleveland, 41 Barb. 610; Dockham *v.* Parker, 9 Me. 137; 23 Am. Dec. 547; Johnson *v.* Smith, 3 Pen. & W. 496; 24 Am. Dec. 339; Lilley *v.* Fifty Associates, 101 Mass. 432.

6 McGee *v.* Gibson, 1 Mon. B. 105.

§ 107. Kinds of rent.—Three kinds of rent are recognized by the English law; namely, rent-service, rent-charge, and rentseck.[1] A rent-service, which was the only kind originally known to the common law, and the one which prevails in the United States, is where the tenant holds his lands by fealty and certain rent, or by rendering services.[2] It was called a rent-service, because it was given as a compensation for the services to which the land was originally liable;[3] and a right of distress was inseparably incident to it.[4] Rent-charge is a rent reserved where the landlord has no reversionary interest, and for such rent no right to distrain exists, unless the power be contained in the lease.[5] A rentseck, or barren rent, is the same as a rent-charge, except that there is no right to distrain reserved.[6] A fee-farm rent is a perpetual rent reserved on a conveyance of lands in fee-simple.[7] But after the statute *quia emptores* (18 Ed. 1, A. D. 1290), a fee-farm rent became impracticable, for the reason that a grantor in fee retains no reversion, which is essential to a rent-service.[8] A perpetual rent may, however, be reserved by deed, with clause of distress, upon a grant in fee, which is valid as a rent-charge, notwithstanding there is no reversion in the person entitled to it.[9] Such a

rent is a hereditament, descendible and devisable forever.[10] So in Pennsylvania, where the statute *quia emptores* is not in force, rent-service in fee (termed a ground-rent), as well as for terms of years, are a very common species of inheritable estate.[11] Fee-farm rents are not usual in this country, but their validity has been repeatedly sustained,[12] and they might undoubtedly exist here to a greater extent, consistently with our laws.[13]

1 2 Greenl. Cruise, 72; 3 Kent Com. 368; Cornell *v.* Lamb, 2 Cowen, 659.

2 Co. Litt. 96 *a*; Cornell *v.* Lamb, 2 Cowen, 656; Kenege *v.* Elliott, 9 Watts, 258; Wallace *v.* Harmstad, 44 Pa. St. 497.

3 2 Greenl. Cruise, 72.

4 Co. Litt. 93 *a*; Cornell *v.* Lamb, 2 Cowen, 656.

5 Cornell *r.* Lamb, 2 Cowen, 656; People *v.* Haskins, 7 Wend. 463; Cuthbert *v.* Kuhn, 3 Whart. 357; 31 Am. Dec. 513; and see In re Locke, 2 Dowl. & R. 605.

6 Cornell *v.* Lamb, 2 Cowen, 659.

7 2 Greenl. Cruise, 74; and see Scott *v.* Lunt, 7 Peters, 606.

8 2 Greenl. Cruise, 75.

9 Bradbury *v.* Wright, 2 Doug. 624; Van Rensselaer *v.* Chadwick, 24 Barb. 333; 22 N. Y. 33; Van Rensselaer *v.* Hays, 19 N. Y. 68.

10 Van Rensselaer *v.* Hays, 19 N. Y. 68. A rent-charge may be taken on execution and sold: Hurst *v.* Lithgrow, 2 Yeates, 24; 1 Am. Dec. 326.

11 Ingersoll *v.* Sergeant, 1 Whart. 337; Wallace *v.* Harmstad, 44 Pa. St. 495. "Rent-service" passes with the reversion, as incident thereto: Lewis *v.* Wilkins, Phill. Eq. 302.

12 Scott *v.* Lunt, 7 Peters, 602; Alexander *v.* Warrance, 17 Mo. 228; Farley *v.* Craig, 11 N. J. L. 267; Cagger *v.* Lansing, 64 N. Y. 429; Lyon *v.* Adde, 63 Barb. 89.

13 See Whartenby *v.* Moran, 3 Call, 424; Marshall *v.* Conrad, 5 Call, 406; Adams *v.* Bucklin, 7 Pick. 123; Cook *v.* Brightly, 46 Pa. St. 439; Van Rensselaer *v.* Smith, 27 Barb. 104.

§ 108. At what time payable.—Where the time for payment of rent is not fixed by custom, or by express stipulation, it is not due until the end of the term.[1] If payable in produce, payment should be made in a reasonable time after the crops are gathered.[2] Payments made by the tenant on account of rent generally, without any direction or agreement as to its application, will be applied by the law on the rent due at the time, and not on the rent then accruing.[3] Rent may be made payable in advance, but a custom to pay in advance cannot be im-

ported into an express covenant to pay quarterly.[4] It is however held, that a lessor's verbal agreement with his tenant to change, for a new consideration, the time of paying the rent, from the beginning to the end of the month, is valid.[5] Under a lease for years from a specified day, rent conditioned to be payable quarterly, on certain days, is not due until after midnight of such days.[6] If the lessee has paid the rent of the term in advance, he will not be liable to pay the same again to an assignee of the reversion.[7]

1 Garvey *v.* Dobyns, 8 Mo. 213; Ridgley *v.* Stillwell, 27 Mo. 128; Perry *v.* Aldrich, 13 N. H. 343; Gibbons *v.* Thompson, 21 Minn. 398; Boyd *v.* McCombs, 4 Pa. St. 146; Hopkins *v.* Helmore, 8 Ad. & E. 463; Cal. Civ. Code, § 1947.

2 Brown *v.* Adams, 35 Tex. 447; Toler *v.* Seabrook, 39 Ga. 14; Lamberton *v.* Stouffer, 55 Pa. St. 276; and see Dockham *v.* Parker, 9 Me. 137; 23 Am. Dec. 547.

3 Hunter *v.* Osterhoudt, 11 Barb. 33.

4 Mitchell *v.* Weller, 1 Jur. 622. Rent payable in advance on a certain day may be paid at any time during that day: Smith *v.* Shepard, 15 Pick. 147; 25 Am. Dec. 432.

5 Wilgus *v.* Whitehead, 89 Pa. St. 131.

6 Ordway *v.* Remington, 12 R. I. 319; 34 Am. Rep. 646. Compare § 98, *ante*; Sherlock *v.* Thayer, 4 Mich. 355. Where a lease, conditioned to be forfeited for the non-payment of rent, provides no place for payment, payment should be demanded by the landlord of the tenant on the premises, just before sunset on the specified day: Jenkins *v.* Jenkins, 63 Ind. 415; 30 Am. Rep. 229; and see Hartwell *v.* Kelly, 117 Mass. 235; Chapman *v.* Harney, 100 Mass. 353.

7 Stone *v.* Patterson, 19 Pick. 476.

§ 109. Distress for recovery of.—At commn law, where a rent-service is in arrear, the person in reversion has a right to enter on the lands, and to seize the cattle and other personal chattels found there, and to sell them for the payment of the rent;[1] and this is called a distress.[2] In England, this remedy has been extended by statutes to the other kinds of rents.[3] The remedy by distress, as modified by statutes, exists to a considerable extent in the United States,[4] but is not in use in the New England States,[5] and a few of the other States discard it.[6] In New York, the remedy has been expressly abolished by statute.[7] It is requisite to a valid distress,

that there should be an actual demise or letting of the premises;[8] the rent must be certain, or capable of being made so;[9] there must be a reversion in the landlord,[10] and the relation of landlord and tenant must subsist at the time the distress is levied.[11] All movable chattels found upon the demised premises, whether belonging to the tenant, or under-tenant, or a stranger, are liable to be distrained, unless specially exempted by the common law or by statute.[12] The tendency of the American decisions especially is, however, against the right of distraining goods not the property of the tenant;[13] and the rule is laid down, that where the tenant, in the course of his business, is necessarily put in possession of the property of those with whom he deals, or of those who employ him, such property, although on the demised premises, is not liable to distress for rent due thereon from the tenant.[14] Thus, unfinished cloth at a fulling mill is exempt from distress if it is the property of a stranger;[15] so goods deposited in a warehouse to be taken care of were held not liable to be distrained;[16] so of goods deposited with a pawnbroker, although pledged for more than a year;[17] and goods held by an agent for sale on commission are not liable to distress for rent due from the agent.[18] The right to distrain is not waived or lost by taking as collateral security for the rent a promissory note, bond, etc.,[19] unless it is expressly taken in absolute payment of the rent.[20] Nor is a demand necessary, as a general rule, before levying a distress.[21] But the distress can be made only in the day-time, between sunrise and sunset, in order that the tenant may have opportunity to tender the rent.[22] Where, by the terms of the lease, the rent is made payable in advance, the landlord may distrain immediately upon the tenant's taking possession;[23] but in other cases he cannot distrain until the next day after the rent is due.[24] As a general rule, the distress must be made on the premises;[25] and for the purpose of seizure, the landlord may open the

outer door in the ordinary way, but he has no authority to break open forcibly a door which is barred or bolted.[26] Having entered through an open door, he may, however, break an inner door.[27]

1 2 Greenl. Cruise, 88; Fraser v. Davie, 5 Rich. 59.

2 See 2 Greenl. Cruise, 88; 2 Dane Abr. 451; 3 Blackst. Com. 6; Van Rensselaer v. Hays, 19 N. Y. 76; Woglam v. Cowperthwaite, 2 Dall. 68; Clark v. Fraley, 3 Blackf. 264.

3 2 Greenl. Cruise, 91; Stat. 4 Geo. II., c. 28; see Cornell v. Lamb, 2 Cowen, 656, 659.

4 2 Washb. Real Prop. 11; 3 Kent Com. 473. See Bean v. Edge, 84 N. Y. 510.

5 See 4 Dane Abr. 126; Walt, appellant, etc. 7 Pick. 105; Owen v. Boyle, 23 Me. 47; 3 Kent Com. 473 n.

6 3 Kent Com. 472, 473; and see Howard v. Dill, 7 Ga. 52; Mayor etc. v. Pearl, 11 Humph. 249; Givens v. Easley, 17 Ala. 385; Knox v. Hunt, 18 Mo. 243.

7 Guild v. Rogers, 8 Barb. 502. The legislature may abolish distress for rent on antecedent leases: Dickerson v. Cook, 16 Barb. 510.

8 Watson v. Wand, 8 Ex. 335; Hancock v. Austin, 14 Com. B. N. S. 634; Dunk v. Hunter, 5 Barn. & Ald. 322.

9 Regnart v. Porter, 7 Bing. 451; Daniel v. Gracie, 6 Q. B. 145; Valentine v. Jackson, 9 Wend. 302; Rosenstein v. Forester, 57 Ga. 94; Diller v. Roberts, 13 Serg. & R. 60; 15 Am Dec. 578.

10 Preece v. Corrie, 5 Bing. 24; Ege v. Ege, 5 Watts, 134; Prescott v. DeForest, 16 Johns. 159; Hill v. Stocking, 6 Hill, 277.

11 Bain v. Clark, 10 Johns. 424; Williams v. Stiven, 9 Q. B. 14; and see Jones v. Carter, 15 Mees. & W. 718; Farrington v. Baley, 21 Wend. 65; Greider's Appeal, 5 Pa. St. 427; Cohen v. Broughton, 54 Ga. 256.

12 Gorton v. Falkner, 4 Term Rep. 565; Giles v. Ebsworth, 10 Md. 333; Kennedy v. Lange, 50 Md. 91; Harvie v. Wickham, 6 Leigh, 236; Stevens v. Lodge, 7 Blackf. 534; Karns v. McKinney, 74 Pa. St. 387; Kieber v. Ward, 88 Pa. St. 93; Connah v. Hale, 23 Wend. 462.

13 See McCreery v. Clafflin, 37 Md. 435; 11 Am. Rep. 542; Youngblood v. Lowry, 2 McCord, 39; 13 Am. Dec. 698; Briggs v. Large, 30 Pa. St. 287; Stone v. Matthews, 7 Hill, 428; Brown v. Sims, 17 Serg. & R. 138.

14 Karns v. McKinney, 74 Pa. St. 390.

15 Hoskins v. Paul, 4 Halst. 110; 17 Am. Dec. 455; and see Adams v. Grane, 1 Cromp. & M. 380; Brown v. Shevill, 2 Ad. & E. 138.

16 Miles v. Furber, L. R. 8 Q. B. 77; and see Brown v. Sims, 17 Serg. & R. 138.

17 Swire v. Leach, 18 Com. B. N. S. 479.

18 Howe Sewing Machine Co. v. Sloan, 87 Pa. St. 438; 30 Am. Rep. 376; McCreery v. Chaffin, 37 Md. 435; 11 Am. Rep. 542.

19 Giles v. Ebsworth, 10 Md. 333; Lofsky v. Manjer, 3 Sand. Ch. 69; Davis v. Gyde, 4 Nev. & M. 462; Atkins v. Byrnes, 71 Ill. 326.

20 Warren v. Forney, 13 Serg. & R. 52.

21 Buffington v. Hilley, 55 Ga. 655.

22 Fry v. Breckenridge, 7 Mon. B. 31; Hovey v. Smith, 1 Barb. 372.

23 Russell v. Doty, 4 Cowen, 576; Atkins v. Byrnes, 71 Ill. 326; Williams v. Howard, 3 Munf. 277.

24 Bailey v. Wright, 3 McCord, 484; and see Lichtenthaler v. Thompson, 13 Serg. & R. 157; 15 Am. Dec. 581; Prentiss v. Kingsley, 10 Pa. St. 120.

25 Grace v. Shively, 12 Serg. & R. 217; Christman v. Floyd, 9 Wend. 340; Hadden v. Knickerbocker, 70 Ill. 677; 22 Am. Rep. 80.

26 Ryan v. Shilcock, 15 Jur. 1200; 8 Eng. L. & Eq. 503; Williams v. Spencer, 5 Johns. 352.

27 Williams v. Spencer, 5 Johns. 352; Slate v. Thackam, 1 Bay, 358.

§ 110. Other remedies for the recovery of.—In most cases, an action of debt will lie for rent, under the common-law practice.[1] And an action of *assumpsit* for the use and occupation of land by permission of the plaintiff lies on an implied[2] as well as on an express promise to pay rent.[3] But an action for use and occupation will lie only where the relation of landlord and tenant exists between the parties,[4] and the defendant must have actually taken possession of the premises, either by himself, his agent, or his under-tenant.[5] If the lease contains a covenant on the part of the lessee to pay the rent, an action of covenant may be brought thereon.[6] Among the defenses to actions for rent are an eviction from the whole or a material part of the premises by the landlord,[7] payment or tender of the rent as provided by the agreement,[8] a surrender in fact, and delivery of possession to and its acceptance by the landlord;[9] and it is also a good defense that a part of the demised premises are occupied for an immoral purpose, with the knowledge and consent of the landlord.[10]

1 Duppa v. Mayo, 1 Saund. 281. See DeLancey v. Ga Nun, 12 Barb. 120; 9 N. Y. 9; Guild v. Rogers, 8 Barb. 504; Allen v. Bryan, 5 Barn. & C. 512; Trabue v. McAdams, 8 Bush, 74. In England an action of debt will now lie for the recovery of a rent-charge in fee: Thomas v. Sylvester, Law R. 8 Q. B. 368; 6 Eng. 103.

2 Gums v. Scovil, 4 Day, 228; 4 Am. Dec. 208; Howard v. Ramson, 2 Atk. 252; Crouch v. Briles, 7 Marsh. J. J. 255; 23 Am. Dec. 404.

3 Sutton v. Mandeville, 1 Munf. 407; 4 Am. Dec. 549; Eppes v. Cole, 4 Har. & McH. 161; Swasey v. Little, 7 Pick. 296; Warner v. Hale, 65 Ill. 396; Howard v. Shaw, 8 Mees. & W. 118. Where there is a lease under seal, no action for use and occupation can be maintained against the lessee or his assignee: Keirsted v. Railroad Co. 69 N. Y. 343; 25 Am. Rep. 199.

4 Smith v. Stewart, 6 Johns. 49; 5 Am. Dec. 183; Bancroft v. Wardwell, 13 Johns. 489; 7 Am. Dec. 393; Edmonson v. Kite, 43 Mo. 178; McCloskey v. Miller, 72 Pa. St. 154; Espy v. Fenton, 5 Oreg. 423; Lankford v. Green, 52 Ala. 104; Hathaway v. Ryan, 35 Cal. 194. Compare Woodbury v. Woodbury, 47 N. H. 20.

5 Bordman v. Osborn, 23 Pick. 295; Waring v. King, 8 Mees. & W. 571; and see Mayor etc. v. Saunders, 3 Barn. & Adol. 412; Edmonson v. Kite, 43 Mo. 176; Bedford v. Terhune, 30 N. Y. 453.

6 2 Greenl. Cruise, 94; Vyvyan v. Arthur, 1 Barn. & C. 410.

7 Hayner v. Smith, 63 Ill. 430; 14 Am. Rep. 124; McClurg v. Price, 59 Pa. St. 420; Tunis v. Grandy, 22 Gratt. 10); Alger v. Kennedy, 49 Vt. 109; 24 Am. Rep. 117; Holmes v. Guion, 41 Md. 164; Colburn v. Morrill, 117 Mass. 262; 19 Am. Rep. 415; Shumway v. Collins, 6 Gray, 227; Edgerton v. Page, 1 Hilt. 323; Morrison v. Chadwick, 7 Conn. B. 383. If, after eviction, the lessee returns and occupies again, the rent revives: Morrison v. Chadwick, 7 Conn. B. 383; Martin v. Martin, 7 Md. 378. Compare Hunter v. Reiley, 43 N. J. L. 430.

8 Carter v. Carter, 5 Bing. 406; Sapsford v. Fetcher, 4 Term Rep. 511.

9 Page v. Ellsworth, 44 Barb. 636; Elliott v. Aiken, 45 N. H. 30; Fuller v. Ruby, 10 Gray, 290; Fisher v. Millikins, 8 Pa. St. 111.

10 Dyett v. Pendleton, 8 Cowen, 727; Townsend v. Gilsey, 1 Sweeny 155; 7 Abb. N. S. 59. Compare Dewitt v. Pierson, 112 Mass. 8; 17 Am. Rep. 53. At common law, the abandonment of the premises by the tenant because untenantable would have been no defense to an action against him for the stipulated rent: Graves v. Cameron, 58 How. Pr. 75.

§ 111. Lien to secure payment of.—Statutes have been enacted in some of the States and in England, giving landlords a lien upon the tenant's goods, or upon the crops growing or grown upon the demised premises, to secure the payment of rent.[1] The lien in such cases attaches at the commencement of the tenancy;[2] and the landlord may maintain a special action against a stranger, who, with notice of a lien upon the crop, destroys, removes, or so converts the crop or changes its character that the landlord cannot enforce his lien.[3] In Illinois, a lien is expressly given the landlord, by statute, upon crops growing or grown upon the demised premises, but no special lien is created or given as to other property of the tenant;[4] and one who purchases of a tenant property, other than crops, and removes the same from the leased premises, takes it freed from the lien of the landlord for rent, even if he knew, at the time of the purchase, that the tenant owed rent, and that the landlord was about to distrain therefor.[5]

1 See Doane *v.* Garretson, 24 Iowa, 351; Givens *v.* Easley, 17 Ala. 385; Broughton *v.* Powell, 52 Ala. 123; Taliafero *v.* Pry, 41 Ga. 622; Washington *v.* Williamson, 23 Md. 244; Woodside *v.* Adams, 40 N. J. L. 417; Reed *v.* Thoyts, 6 Mees. & W. 410. Valid agreement for lien: see Wisner *v.* Ocumpaugh, 71 N. Y. 113.

2 Smith *v.* Meyer, 25 Ark. 609; Powell *v.* Hadden, 21 Ala. 748: Fowler *v.* Rapley, 15 Wall. 328.

3 Hussey *v.* Peebles, 53 Ala. 432.

4 Rev. Stats. 1845, p. 335, § 8; Hadden *v.* Knickerbocker, 70 Ill. 677; 22 Am. Rep. 80.

5 Hadden *v.* Knickerbocker, 70 Ill. 677; 22 Am. Rep. 80. Compare O'Hara *v.* Jones, 46 Ill. 288; Martin *v.* Black. 9 Paige, 641; Bach *v.* Meats, 5 Maule & S. 200.

§ 112. Apportioning rents.—It is now an established doctrine, that where there is a severance of the reversion, either by the act of the parties or of the law, the rent follows and is apportioned;[1] that is, it becomes payable to the several grantees or assignees *pro rata*, according to the relative values of their respective portions.[2] The doctrine applies where the reversion is severed by the death of the lessor and a descent to his heirs, and the heirs may separately bring actions for their several proportions.[3] And a rent itself may be apportioned by a devise of it to several persons.[4] But an apportionment of the rent by the landlord to different persons cannot be made without the tenant's assent,[5] though with such assent it may be.[6] It has been held that an apportionment will be made at the instance of a tenant, where a part of the premises is taken for public use; as where a public street is opened through the demised premises.[7] So where the lease was of a saw-mill and one room in an adjoining factory, and both were destroyed by fire, it was held that the tenant was discharged from rent for the room, but not for the saw-mill.[8] And where real and personal property are leased by a single instrument for an amount in gross, and the personalty is a substantial part of the property leased, its destruction without the fault of the lessee, by fire or otherwise, entitles the lessee to an apportionment of the rent.[9] Where a testator, seized in fee, devised real estate by a will dated before

the English apportionment act, 1870 (33 and 34 Vict. c. 35), and confirmed it by a codicil dated after the act, it was held that the rents were apportionable between the executor and the devisee;[10] and it seems that the result would have been the same without the codicil.[11] It has been repeatedly held, that the destruction of the leased premises by fire, occurring through accident or negligence, does not afford ground for relieving the tenant from the payment of rent.[12] But if there be a substantial destruction of the subject-matter, out of which rent is reserved in a lease for years, by an act of God, or of the public enemy, the tenant may elect to rescind, and on surrendering all benefit thereunder, he shall be discharged from the payment of rent.[13]

1 See Co. Litt. 147 *b*; 2 Greenl. Cruise, 117; Jacques *v.* Gould, 4 Cush. 334; Daniels *v.* Richardson, 22 Pick. 565.

2 Cole *v.* Patterson, 25 Wend. 456; Newall *v.* Wright, 3 Mass. 138; Reed *v.* Ward, 22 Pa. St. 144; Russell *v.* Allen, 2 Allen, 42; Martin *v.* Martin, 7 Md. 368. The apportionment must be according to value, and not quantity or number of acres: Van Rensselaer *v.* Gallup, 5 Denio, 454; and compare Reed *v.* Ward, 22 Pa. St. 150.

3 Cole *v.* Patterson, 25 Wend. 456; Jones *v.* Felch, 3 Bosw. 63; Crosby *v.* Loop, 13 Ill. 625.

4 Arde *v.* Watkin, Cro. Eliz. 637, 651.

5 Bliss *v.* Collins, 5 Barn. & Ald. 876; 1 Dowl. & R. 291. See Matter of Eddy, 10 Abb. N. C. 376.

6 Ryerson *v.* Quackenbush, 26 N. J. L. 254. Under the New York statute, the right to rent follows the ownership of the estate during the period when it is earned by the property: Matter of Eddy, 10 Abb. N. C. 396.

7 Cuthbert *v.* Kuhn, 3 Whart. 357; 31 Am. Dec. 513. And see O'Connor *v.* O'Connor, 2 Grant Cas. 245; Dyer *v.* Wightman, 66 Pa. St. 423. But compare Workman *v.* Mifflin, 30 Pa. St. 371; 31 Am. Dec. 517, note.

8 Womack *v.* McQuarry, 28 Ind. 103.

9 Whitaker *v.* Hawley, 25 Kan. 674; 37 Am. Rep. 277; but compare Farewell *v.* Dickenson, 6 Barn. & C. 251; Bussman *v.* Ganster, 72 Pa. St. 285; Sutliffe *v.* Atwood, 15 Ohio St. 185.

10 Capron *v.* Capron, Law R. 17 Eq. Cas. 288; 7 Eng. 822.

11 Capron *v.* Capron, Law R. 17 Eq. Cas. 288; 7 Eng. 822.

12 See Graves *v.* Berdan, 29 Barb. 100; 26 N. Y. 498; Izon *v.* Gorton, 5 Bing. N. C. 501; 35 Eng. C. L. 198; Cowell *v.* Lumley, 39 Cal. 151; 2 Am. Rep. 430; Lofft *v.* Dennis, 1 El. & E. 481; Smith *v.* Ankrim, 13 Smedes & M. 39.

13 Coogan *v.* Parker, 2 S. C. 255; 16 Am. Rep. 659. Compare Edwards *v.* Hetherington, 7 Moo. & Ry. 117; 16 Eng. C. L. 271; Cowie *v.* Goodwin, 38 Eng. C. L. 162; 9 Car. & P. 378.

CHAPTER XI.

WASTE.

§ 113. What constitutes.
§ 114. Cutting trees, etc.
§ 115. In buildings.
§ 116. Opening mines, etc.
§ 117. Improper cultivation of land.
§ 118. Act of God.
§ 119. Remedy by action.
§ 120. Remedy in equity.

§ 113. What constitutes.—Waste is a lasting damage to the reversion caused by the destruction, by the tenant for life or years, of such things on the land as are not included in its temporary profits.[1] To constitute waste there must be either a diminishing of the value of the estate, an increasing of the burdens upon it, or an impairing of the evidence of title.[2] It is either *voluntary*, which consists in doing some positive act injurious to the inheritance; or *permissive*, which is a matter of omission only, resulting in an injury to the inheritance.[3] In this country there is said to be no exception to the general rule of law, that no act of a tenant will amount to waste, unless it is or may be prejudicial to the inheritance, or to those entitled to the reversion or remainder.[4]

1 Proffitt *v.* Henderson, 29 Mo. 325; Wilds *v.* Layton, 1 Del. Ch. 226; 12 Am. Dec. 91; and see McGregor *v.* Brown, 10 N. Y. 117; Lynn's Appeal, 31 Pa. St. 46; Jones *v.* Chappell, L. R. 20 Eq. 539; 15 Eng. R. 475. Distinction between waste and trespass: See Duvall *v.* Waters, 1 Bland Ch. 569; 18 Am. Dec. 350.

2 Doe *v.* Burlington, 5 Barn. & Adol. 517; Huntley *v.* Russell, 13 Q. B. 588; Wilds *v.* Layton, 1 Del. Ch. 228; 12 Am. Dec. 91. Compare Richards *v.* Torbert, 3 Houst. 172.

3 Martin *v.* Gilham, 7 Ad. & E. 540; Baxter *v.* Taylor, 1 Nev. & M. 13; Drown *v.* Smith, 52 Me. 141.

4 Pynchon *v.* Stearns, 11 Met. 304; and see Winship *v.* Pitts, 3 Paige, 259; Keeler *v.* Eastman, 11 Vt. 393; Ward *v.* Sheppard, 2 Hayw. 283; 2 Am. Dec. 625.

§ 114. Cutting trees, etc.—An instance of voluntary waste is that which consists in felling timber-trees,

except for certain purposes, because they are not deemed part of the annual produce of the land, but belong to the owner of the inheritance.[1] So if the tenant lops timber-trees, or does anything else which causes them to decay, it is waste at common law.[2] So if he destroys or "stubs up" the young shoots, it is waste;[3] and so if he cuts down trees standing in the defense and safeguard of a house.[4] Timber-trees are those which serve for building or repairing houses, such as oak, ash, elm, etc., of the age of twenty years and upwards.[5] Whether trees were felled with the *bona fide* intention of applying them to repairs is a question for the jury.[6] The doctrine of waste, as understood in England, is inapplicable in many respects to a new, unsettled country.[7] It has accordingly been held, in States where the land is new and covered with forest, that the tenant may fell part of the wood and timber, so as to fit the land for cultivation, without being liable for waste;[8] but he cannot cut down all the wood and timber, so as permanently to injure the inheritance.[9] To what extent he may do so, without waste, is a question for the jury to determine, under the direction of the court.[10] It is not waste for the tenant to cut down trees under twenty years old, although timber-trees, if cut seasonably and in a proper manner.[11] So he may cut down trees, in the course of proper management, in order to permit the growth of other timber.[12] And, in short, he may cut down all trees which will not be timber, and are not trees for ornament or the protection of the estate.[13] He may cut timber to repair the house and fences when necessary,[14] and may take reasonable estovers;[15] but he cannot cut timber for fire-wood if there be sufficient dead wood on the premises;[16] nor may he cut timber for repairs made necessary by his own wrong.[17] Timber cut by permission in clearing the land belongs to the tenant.[18]

1 Co. Litt. 53 *a*; Liford's Case, 11 Rep. 48 *b*; 2 Greenl. Cruise, 121; Jackson *v.* Brownson, 7 Johns. 227; 5 Am. Dec. 258; Torry *v.* Black, 65 Barb. 414; 53 N. Y. 185; Robinson *v.* Kime, 70 N. Y. 147.

2 2 Blackst. Com. 281; 2 Greenl. Cruise, 123.

3 Liford's Case, 11 Rep, 48 *b*; Dunn *v.* Bryan, 7 Ired. Eq. 143.

4 Co. Litt. 53 *a*; 3 Dane Abr. 217; Dunn *v.* Bryan, 7 Ired. Eq. 143.

5 Chandos *v.* Talbot, 2 P. Wms. 606; Cumberland's Case, Moo. 812; Alexander *v.* Fisher, 7 Ala. 514; Honywood *v.* Honywood, Law R. 18 Eq. 306; 9 Eng. 819. Compare Padelford *v.* Padelford, 7 Pick. 152; Aubrey *v.* Fisher, 10 East, 446; Bullen *v.* Denning, 5 Barn. & C. 842.

6 Doe *v.* Wilson, 11 East, 56.

7 See McGregor *v.* Brown, 10 N. Y. 118; Chase *v.* Hazelton, 7 N. H. 171; Keeler *v.* Eastman, 11 Vt. 293; Ward *v.* Sheppard, 2 Hayw. 283; 2 Am. Dec. 625.

8 McCullough *v.* Irvine, 13 Pa. St. 438; Moorehouse *v.* Cotheal, 22 N. J. L. 521; Harder *v.* Harder, 26 Barb. 414; Drown *v.* Smith, 52 Me. 141; Proffitt *v.* Henderson, 29 Mo. 327.

9 Jackson *v.* Brownson, 7 Johns. 227; 5 Am. Dec. 258.

10 Jackson *v.* Brownson, 7 Johns. 227; 5 Am. Dec. 258; Harder *v.* Harder, 26 Barb. 414; Davis *v.* Gilliam, 5 Ired. Eq. 311; Ward *v.* Sheppard, 2 Hayw. 283; 2 Am. Dec. 625. Compare McGregor *v.* Brown, 10 N.Y. 118; McCay *v.* Wait, 51 Barb. 225.

11 Dunn *v.* Bryan, 7 Ired. Eq. 143.

12 Cowley *v.* Wellesley, Law R. 1 Eq. 656; Crockett *v.* Crockett, 2 Ohio St. 180; Keeler *v.* Eastman, 11 Vt. 293; and see Bateman *v.* Hotchkin, 31 Beav. 487.

13 Honywood *v.* Honywood, Law R. 18 Eq. 306; 9 Eng. 819; compare Phillips *v.* Smith, 14 Mees. & W. 589; King *v.* Ferrybridge, 1 Barn. & C. 379.

14 Co. Litt. 53 *a*; Miles *v.* Miles, 32 N. H. 147; Harder *v.* Harder, 26 Barb. 409.

15 Gardner *v.* Derring, 1 Paige, 573; § 86, *ante*.

16 Simmons *v.* Norton, 7 Bing. 640. See Padelford *v.* Padelford, 7 Pick. 152.

17 Padelford *v.* Padelford, 7 Pick. 152.

18 Davis *v.* Gilliam, 5 Ired. Eq. 311; Crockett *v.* Crockett, 2 Ohio St. 180.

§ 115. In buildings.—As it respects buildings, waste may be either voluntary, as by pulling them down,[1] or permissive, in suffering them to decay.[2] Unroofing or altering buildings,[3] removing floors or things fixed to the freehold in a house,[4] pulling down a house and rebuilding it in a different style,[5] or even upon a more favorable site, would all be deemed acts of waste at common law.[6] The tenant has no right to pull down valuable buildings, or to make improvements or alterations which will materially or permanently change the nature of property so as to render it impossible for him to restore the same premises substantially, at the expiration of the term.[7] But it is not waste if he erect a new edifice upon the demised prem-

ises, provided it can be done without destroying or materially injuring the buildings or other improvements already existing there.[8] If a house is in a ruinous condition when the tenant takes possession, it is not waste to suffer it to remain so;[9] and he may even pull it down if it be dangerous to his cattle.[10] And although a tenant must use ordinary care to prevent buildings going to decay, he is not bound to make extraordinary expenditures for that purpose,[11] and he may defer repairs until they shall be less expensive, if no permanent injury results.[12]

1 Co. Litt. 53 *a*; 2 Greenl. Cruise, 124; Clemence *v.* Steere, 1 R. I. 272.

2 3 Dane Abr. 214; 2 Greenl. Cruise, 126; Long *v.* Fitzsimmons, 1 Watts & S. 530.

3 Co. Litt. 53 *a*; City of London *v.* Greyme, Cro. Jac. 181; Douglass *v.* Wiggins, 1 Johns. Ch. 435; Agate *v.* Lowenbein, 57 N. Y. 604; Bonnett *v.* Sadler, 14 Ves. 526; Maunsell *v.* Hart, 11 Ired. Eq. 478.

4 3 Dane Abr. 215; Wall *v.* Hinds, 4 Gray, 256; Thacher *v.* Phinney, 7 Allen, 146; Austin *v.* Stevens, 24 Me. 520; and see Agate *v.* Morrison, 12 Week. Dig. 254; 84 N. Y. 672.

5 Rolle Abr. 815.

6 Huntley *v.* Russell, 13 Q. B. 588; Greene *v.* Cole, 2 Saund. 252.

7 Winship *v.* Pitts, 3 Paige, 262.

8 Winship *v.* Pitts, 3 Paige, 262; and see Jackson *v.* Andrew, 18 Johns. 431; Young *v.* Spencer, 10 Barn. & C. 145; Beers *v.* St. John, 16 Conn. 322.

9 Clemence *v.* Steere, 1 R. I. 272.

10 Clemence *v.* Steere, 1 R. I. 273.

11 Wilson *v.* Edmonds, 24 N. H. 517.

12 Harvey *v.* Harvey, 41 Vt. 373.

§ 116. Opening mines, etc.—It would be waste to open land to search for mines,[1] or to open new mines, unless the demise includes them.[2] But it is not waste to work mines that are open, and to take the profits thereof.[3] And new shafts or pits may be opened in order to follow the same vein,[4] and the tenant may transfer this right to others.[5] So if there is an existing salt well and a manufactory of salt on the premises, it is not waste to dig a new salt well in connection with it.[6] It is waste to dig for gravel, lime, clay, brick, earth, stone, or the like on the demised premises,[7] unless such has been the usual mode of improving the land.[8]

1 Saunders's Case, 5 Rep. 12; Darcy v. Askwith, Hob. 234; Viner v. Vaughn, 2 Beav. 466.

2 Owings v. Emery, 6 Gill, 260; United States v. Gear, 3 How. 120; Irwin v. Covode, 24 Pa. St. 162.

3 Stoughton v. Leigh, 1 Taunt. 410; Neel v. Neel, 19 Pa. St. 324; Gaines v. Green Pond etc. Min. Co. 33 N. J. Eq. 603; Elias v. Griffith, Law R. 8 Ch. Div. 521.

4 Billings v. Taylor, 10 Pick. 460; Findlay v. Smith, 6 Munf. 134; 8 Am. Dec. 733; Clavering v. Clavering, 2 P. Wms. 388; Gaines v. Green Pond etc. Min. Co. 33 N. J. Eq. 603.

5 Kier v. Peterson, 41 Pa. St. 361; Irwin v. Covode, 24 Pa. St. 162; and see Massot v. Moses, 3 S. C. 168; 16 Am. R. 697.

6 Findlay v. Smith, 6 Munf. 134; 8 Am. Dec. 733.

7 Livingston v. Reynolds, 2 Hill, 157; Huntley v. Russell, 13 Q. B. 591; Moyle v. Moyle, Owen, 66.

8 Huntley v. Russell, 13 Q. B. 591.

§ 117. Improper cultivation of land.—The early English cases adopted the stringent rule, that the conversion of one kind of land into another—as wood, meadow, or pasture into arable land, or the contrary—was waste.[1] But according to the later decisions, especially in this country, the question depends upon whether the change in the mode of culture is justified by good husbandry,[2] and the usages of the place.[3] Thus, it is not waste for the tenant to sell hay to be removed from the farm, where such is the custom of husbandry in the vicinity.[4] But the impoverishment of fields, by constant tillage from year to year,[5] or the removal from the premises of the manure made thereon in the course of husbandry,[6] or to suffer pastures to become overgrown with brush, would be waste.[7] So if a farm is let as a dairy farm, clearing woodland is in itself waste.[8]

1 Darcy v. Askwith, Hob. 234; Co. Litt. 53 b.

2 See Phillips v. Smith, 14 Mees. & W. 594; Simmons v. Norton, 7 Bing. 640; Loomis v. Wilbur, 5 Mason, 13; Crockett v. Crockett, 2 Ohio St. 180; Profit v. Henderson, 29 Mo. 327.

3 Webster v. Webster, 33 N. H. 25; Jones v. Whitehead, 1 Pars. Cas. 304.

4 Sarles v. Sarles, 3 Sand. Ch. 601.

5 Sarles v. Sarles, 3 Sand. Ch. 601.

6 Lewis v. Jones, 17 Pa. St. 262.

7 Clemence v. Steere, 1 R. I. 272; Clark v. Holden, 7 Gray, 8. See also Jackson v. Andrew, 18 Johns. 431.

8 McGregor v. Brown, 10 N. Y. 114. Mere ill husbandry has been

held not to be waste: Richards *v.* Torbert, 3 Houst. 172; and see Hutton *v.* Warren, 1 Mees. & W. 472. In England, heir-looms are deemed in law as part of the estate, and the destruction of them by the tenant is waste: 2 Greenl. Cruise, 126; Foley *v.* Burnell, 1 Bro. C. C. 279.

§ 118. Act of God.—Waste which ensues from the act of God, public enemies, or the law, is excusable.[1] Thus, if a house falls in consequence of a tempest, or if the banks of a river are destroyed by a sudden flood, and the land is thereby overflowed, the tenant is not liable for the waste.[2] And if one, under authority of law, opens gravel pits within the demised premises, the tenant is not liable.[3] But if a house is merely unroofed by a tempest, the tenant is bound to repair before the timbers decay;[4] and, as a general rule, he is bound to protect from waste even against strangers.[5]

1 2 Rolle Abr. 820; 2 Greenl. Cruise, 126; Huntley *v.* Russell, 13 Q. B. 591; White *v.* Wagner, 4 Har. & J. 373; 7 Am. Dec. 674.

2 Griffith's Case, Moo. 69; Co. Litt. 53 *b*.

3 Huntley *v.* Russell, 13 Q. B. 591.

4 2 Rolle Abr. 820; Polard *v.* Shaffer, 1 Dall. 210.

5 Co. Litt. 54 *a*; 3 Dane Abr. 225; Fay *v.* Brewer, 3 Pick. 203; Randall *v.* Cleaveland, 6 Conn. 328.

§ 119. Remedy by action.—The action of waste as formerly known at common law was a mixed action, and could only be brought by the person having the inheritance at the time the waste was committed to his prejudice, against the tenant in dower, or by the courtesy.[1] Being confined in its operation to the proprietor of the inheritance and the tenant of the land, between whom there existed a relation of privity to some extent, if, after waste, the inheritance was alienated, and that privity broken up, the action of waste was gone.[2] But by the statutes of Marlbridge (52 Hen. 3, c. 24), and that of Gloucester (6 Edw. 1, c. 5), the action was given a wider range, and could be brought against the lessee for life or years, or against the assignee of the same for waste done after the assignment.[3] In order to avoid the defects of the remedy, as known to the common law, or as modified

by the above-named statutes, the action on the case in the nature of waste was devised, which enables the party injured in his reversionary right to recover damages for the same.[4] And this remedy extends to every case where one who has any reversionary interest or estate in the premises suffers by the tortious act of the actual tenant or occupant.[5] It is an equitable action, and must be sustained in all cases, and against all persons who are by the common law or under the statutes aforesaid liable to the action of waste.[6] And it entitles the party to recover for the actual damage committed, with costs, against any one who commits the wrong, whether lessee or stranger.[7] Nor is the action defeated by the transfer of the premises by the plaintiff to the defendant, pending the action.[8] An entry and holding, by permission of and subservient to the owner, constitutes a sufficient tenancy to render the occupier liable to the action;[9] and even a party in adverse possession may be sued for waste.[10] So it has been held that actions on the case in the nature of waste may be maintained for permissive as well as voluntary waste.[11] The whole matter of waste is to a great extent regulated by statutes in the different States, and the statute of the particular State should be consulted.[12]

1 Greene *v.* Cole, 3 Wms. Saund. 252, note 7; Co. Litt. 218 *b*, note 122; 2 Greenl. Cruise, 129; Peterson *v.* Clark, 15 Johns. 205. A judgment creditor has no such lien upon the real estate of his debtor as would enable him to sue and recover for waste committed thereon: Lanning *v.* Carpenter, 48 N. Y. 408.

2 1 Co. Litt. 53 *a*; and see Bates *v.* Shraeder, 13 Johns. 263; Foot *v.* Dickinson, 2 Met. 611; Dickinson *v.* Mayor, 43 Md. 583; 30 Am. Rep. 492.

3 2 Blackst. Com. 283; Greene *v.* Cole, 3 Wms. Saund. 252, note 7; and see Chipman *v.* Emeric, 3 Cal. 283; Sackett *v.* Sackett, 8 Pick. 312; McLaughlin *v.* Long, 5 Har. & J. 113.

4 Greene *v.* Cole, 3 Wms. Saund. 252, note 7; Chase *v.* Hazelton, 7 N. H. 175; Stetson *v.* Day, 51 Me. 434.

5 Dickinson *v.* Mayor, 43 Md. 583; 30 Am. Rep. 492.

6 White *v.* Wagner, 4 Har. & J. 373; 7 Am. Dec. 674.

7 Chase *v.* Hazelton, 7 N. H. 176; Randall *v.* Cleaveland, 6 Conn. 328; Short *v.* Wilson, 13 Johns. 33; Moore *v.* Townshend, 33 N. J. L. 284; Cornish *v.* Strutton, 8 Mon. B. 536; and see Harvey *v.* Harvey, 41 Vt. 373; Parker *v.* Chambliss, 12 Ga. 235.

8 Dickinson *v.* Mayor, 43 Md. 583; 30 Am. Rep. 492.

9 Freeman *v.* Headley, 33 N. J. L. 523.

10 People *v.* Davison, 4 Barb. 109.

11 Green *v.* Cole, 3 Wms. Saund. 252, note 7; and see Moore *v.* Townshend, 33 N. J. L. 284. But compare Herne *v.* Bembow, 4 Taunt. 764; Jones *v.* Hill, 7 Taunt. 392; Gibson *v.* Wells, 1 Bos. & P. N. R. 390.

12 See Rutherford *v.* Aiken, 3 N. Y. Sup. Ct. (T. & C.) 60; Hamden *v.* Rice, 24 Conn. 350; Sackett *v.* Sackett, 8 Pick. 309; 1 Washb. Real Prop. *122, note. Where the waste consists in the removal of timber, hay, etc., from the premises, the reversioner may seize them if he can, or sue in trover for their conversion, or replevy them, or bring trespass *de bonis* for the taking: Mooers *v.* Walt, 3 Wend. 104; Richardson *v.* York, 14 Me. 216; Plumer *v.* Plumer, 30 N. H. 558; Lane *v.* Thompson, 43 N. H. 324; or, if the tenant has sold the timber, etc., an action for money had and received will lie against him: Leagram *v.* Knight, Law R. 2 Ch. App. 631. If trees are blown down by a tempest, trover is the proper remedy against one who carries them away: Shult *v.* Barker, 12 Serg. & R. 272.

§ 120. Remedy in equity.—A more usual remedy in cases of waste is that afforded by courts of equitable jurisdiction, in granting an injunction restraining the commission of the waste.[1] And it has become almost a matter of course to grant this remedy, where it is made to appear that the injury complained of will injure the inheritance, or be productive of irreparable mischief,[2] and the remedy at law is imperfect or is wholly denied.[3] If the waste is trivial and of small extent, equity will not, however, interfere;[4] and the mere apprehension that waste will be committed is not sufficient ground for an injunction.[5] But the assertion of a right to commit waste, and threats to do so, constitute sufficient ground.[6] The remedy by injunction applies to every species of waste,[7] including equitable waste, which is defined to be that which a prudent man would not do in the management of his own affairs.[8] It is, however, restricted to cases in which the title is clear and undisputed;[9] and, as a general rule, is never granted against a defendant in possession, claiming adversely to the plaintiff.[10] Nor will equity interfere to restrain waste in cases of tenants in common, coparceners, or joint tenants.[11] And if a tenant erects a building on the demised premises, its removal by him will not be enjoined at the suit of the landlord, if it appears that the latter is not entitled to the reversion.[12] The application for an injunction to restrain

waste should, in general, be made without delay;[13] and especially in the cases of mines, due diligence is requisite.[14]

1 Denny *v.* Brunson, 29 Pa. St. 382; Duvall *v.* Waters, 1 Bland Ch. 569; 18 Am. Dec. 350; Kane *v.* Vanderburgh, 1 Johns. Ch. 11; Wickham *v.* Wickham, 19 Ves. 423; Camp *v.* Bates, 11 Conn. 51; Birch-Wolfe *v.* Birch, Law R. 9 Eq. Cas. 683; Higginbotham *v.* Hawkins, Law R. 7 Ch. 676; 3 Eng. R. 568.

2 Amelung *v.* Seekamp, 9 Gill & J. 468; Markham *v.* Howell, 33 Ga. 508; Atkins *v.* Chilson, 7 Met. 398; Bogey *v.* Shute, 1 Jones' Eq. 180; Leighton *v.* Leighton, 32 Me. 399.

3 Cockey *v.* Carroll, 4 Md. Ch. 344; Watson *v.* Hunter, 5 Johns. Ch. 170. Injunction and account of past waste may be sought in one suit: Duvall *v.* Waters, 1 Bland Ch. 569; 18 Am. Dec. 350.

4 Barry *v.* Barry, 1 Jacob & W. 631. Compare Livingston *v.* Reynolds, 26 Wend. 115.

5 Hanson *v.* Gardiner, 7 Ves. 307.

6 Rodgers *v.* Rodgers, 11 Barb. 595; Loudon *v.* Warfield, 5 Marsh. J. J. 196; Canal Co. *v.* Comegys, 2 Ind. 469; Campbell *v.* Allgood, 17 Beav. 628.

7 Hawley *v.* Clowes, 2 Johns. Ch. 122.

8 Turner *v.* Wright, 2 DeGex, F. & J. 234; and see 2 Story Eq. Jur. § 915.

9 Storm *v.* Mann, 4 Johns. Ch. 21; Hough *v.* Martin, 2 Dev. & B. Eq. 379; Gibson *v.* Smith, 2 Atk. 182; Higgins *v.* Woodward, 1 Hopk. Ch. 342; Tessier *v.* Wise, 3 Bland Ch. 60. But compare Green *v.* Keen, 4 Md. 98.

10 Lansing *v.* Steamboat Co. 7 Johns. Ch. 162; Pillsworth, *v.* Hopton, 6 Ves. 51. But compare Cornelius *v.* Post, 9 N. J. Eq. 196; Earl Talbot *v.* Scott, 4 Kay & J. 96.

11 Hihu *v.* Peck, 18 Cal. 640; Hole *v.* Thomas, 7 Ves. 589. Compare Twort *v.* Twort, 16 Ves. 128; Oglesby Coal Co. *v.* Pasco, 79 Ill. 164; Hawley *v.* Clowes, 2 Johns. Ch. 122.

12 Perrine *v.* Marsden, 34 Cal. 14.

13 Barry *v.* Barry, 1 Jacob & W. 631. Compare Att.-Gen. *v.* Eastlake, 11 Hare, 228; Bagot *v.* Bagot, 32 Beav. 509; Cregan *v.* Cullen, 16 Ir. Ch. 339.

14 Norway *v.* Rowe, 19 Ves. 159; Clegg *v.* Edmondson, 8 DeGex, M. & G. 808.

CHAPTER XII.

ESTATE AT WILL.

§ 121. Definition of.
§ 122. Incidents to.
§ 123. How determined.
§ 124. Estate from year to year.
§ 125. Nature of tenancy at sufferance.
§ 126. License.
§ 127. Revocation of license.

§ 121. Definition of.—An estate at will is defined to be an estate in lands, which the tenant has, by entry

made thereon, under a demise, to hold during the joint wills of the parties to the same.[1] The lessee is called tenant at will, because he has no certain or sure estate.[2] The tenancy may arise by implication, as well as by express words;[3] as where one enters upon land by permission of the owner for an indefinite period, even without the reservation of any rent, he is, by implication of law, a tenant at will.[4] The tenancy may be created by an occupation under a lease or deed which is void;[5] or under a contract with the owner for a purchase not yet completed.[6] So one let into possession under an agreement that a lease shall be executed, but in the mean time he shall enjoy the premises on the terms of the lease, becomes immediately a tenant at will.[7] And, in general, all interests in the use and enjoyment of lands for uncertain and indefinite terms are, in construction of law, leases at will.[8] Where A granted to B the right to enter upon his land, and to mine and remove coal and other minerals therefrom "during the continuance of the agreement," and to erect all needful buildings for that purpose, paying to A a certain price per ton for the minerals taken, and it was agreed that B should have the right to cease mining, and to remove his buildings at any time—it was held that B took an estate at will, determinable at the will of either party.[9] But a mere agreement by a tenant to pay rent in advance does not create this estate.[10]

1 Co. Litt. 55 *a*; 1 Washb. Real Prop. 370; Bayley *v.* Fitzmaurice, 8 El. & B. 679; Pollock *v.* Kittrell, 2 Tayl. 153; Knight *v.* Indiana Coal etc. Co. 47 Ind. 105; 17 Am. Rep. 692; Austin *v.* Thompson, 45 N. H. 113. See Goodenow *v.* Allen, 63 Me. 308.

2 2 Greenl. Cruise, 276, 277; and see Richardson *v.* Langridge, 4 Taunt. 131.

3 Jackson *v.* Bradt, 2 Caines, 169; Rex *v.* Fillongley, 1 Term Rep. 458; Doe *v.* Cox, 11 Q. B. 122; Say *v.* Stoddard, 27 Ohio St. 478; Elliott *v.* Stone, 1 Gray, 571.

4 Burns *v.* Bryant, 31 N. Y. 453; Sarsfield *v.* Healy, 50 Barb. 245; Larned *v.* Hudson, 60 N. Y. 102; Jones *v.* Shay, 50 Cal. 508; Wright *v.* Roberts, 52 Wis. 161; Ball *v.* Cullimore, 2 Cromp. M. & R. 120; 5 Tyrw. 753; Dame *v.* Dame, 38 N. H. 429; and see Right *v.* Beard, 13 East, 210; Doe *v.* Quigley, 2 Camp. 505; Ramsden *v.* Thornton, Law R. 1 H. L. Cas. 129.

5 Doe *v.* Stennett, 2 Esp. 717; Ezelle *v.* Parker, 41 Miss. 320; Derm

v. Fearnside, 1 Wils. 176; Huyser *v.* Chase, 13 Mich. 98. Or under an agreement for a lease: Braythwayte *v.* Hitchcock, 10 Mees. & W. 494.

6 Proprietors etc. *v.* M'Farland, 12 Mass. 325; Jackson *v.* Miller, 7 Cowen, 747; Jones *v.* Jones, 2 Rich. 542; Glascock *v.* Robards, 14 Mo. 350; Dean *v.* Comstock, 32 Ill. 180; Risely *v.* Ryle, 11 Mees. & W. 16.

7 Anderson *v.* Midland Railw. Co. 3 El. & E. 614; and see Manchester *v.* Doddridge, 3 Ind. 360; Dunne *v.* Trustees etc. 39 Ill. 578.

8 Cheever *v.* Pearson, 16 Pick. 271; Leavitt *v.* Leavitt, 47 N. H. 329; Gould *v.* Thompson, 4 Met. 224; Doe *v.* McKaeg, 10 Barn. & C. 721; Post *v.* Post, 14 Barb. 253; Doe *v.* Baker, 4 Dev. 220; Rich *v.* Bolton, 46 Vt. 84; 14 Am. Rep. 615. But the mere occupancy of property does not necessarily imply the relation of landlord and tenant: Edmonson *v.* Kite, 43 Mo. 176; Jordan *v.* Mead, 19 La. An. 101.

9 Knight *v.* Indiana Coal etc. Co. 47 Ind. 105; 17 Am. Rep. 692; and see Kitchen *v.* Pridgen, 3 Jones (N. C.) 49.

10 Sprague *v.* Quinn, 108 Mass. 553. A parol gift of land creates a tenancy at will: Jackson *v.* Rogers, 1 Johns. Cas. 33; 2 Caines Cas. 314.

§ 122. Incidents to.—A tenant at will is entitled to emblements,[1] if the estate be determined by the lessor;[2] otherwise if the tenant terminates the tenancy by his own act or fault.[3] One who is let into possession under a parol contract to purchase is a tenant at will, so far as relates to the emblements.[4] And a lease terminable in the spring of any year, in case the farm is sold, is practicably one at will, and the tenant is entitled to a crop of grain sown by him in the fall.[5] A tenant at will is also entitled to reasonable estovers,[6] and it has been held that manure made upon the land belongs to him.[7] An obligation to pay rent is not a necessary incident of a tenancy at will.[8] Thus, one who is let into possession under a contract to purchase is strictly a tenant at will,[9] but he is not liable for rent, while the contract of sale is open, because a promise to pay rent cannot be implied in such a case, the tenant having entered under a different contract.[10] But if he continues in possession after the contract for purchase is wholly at an end, by the fault of the vendor, he may be held liable as tenant for use and occupation.[11] If, however, the refusal to perform the contract of sale is on his part, and he still continues in possession, the remedy of the owner is an action of trespass, and not assumpsit.[12] And if a tenant at will cuts down timber-trees, or pulls down houses, the lessor may bring trespass against him,[13] but he is not technically chargeable in waste.[14]

1 See § 36, *ante;* Reilly *v.* Ringland, 44 Iowa, 422; Leighton *v.* Theed, 1 Raym. Ld. 707.

2 Whitemarsh *v.* Cutting, 10 Johns. 361; Simpkins *v.* Rogers, 15 Ill. 398; Doe *v.* Price, 9 Bing. 358; King *v.* Fowler, 14 Pick. 238; Sherburne *v.* Jones, 20 Me. 70; Kenna *v.* Nugent, 7 I. R. C. L. 464.

3 Oland's Case, 5 Rep. 116; Bulwer *v.* Bulwer, 2 Barn. & Ald. 470; Carpenter *v.* Jones, 63 Ill. 517.

4 Harris *v.* Frink, 49 N. Y. 24; 10 Am. Rep. 318.

5 Pfauner *v.* Sturmer, 40 How. Pr. 401.

6 Davis *v.* Thompson, 13 Me. 209; Chandler *v.* Thurston, 10 Pick. 209. See § 36, *ante.*

7 See Rinehart *v.* Olwine, 5 Watts & S. 157; Smithwick *v.* Ellison, 2 Ired. 326; Roberts *v.* Barker, 1 Cromp. & M. 809.

8 Doe *v.* Baker, 4 Dev. (N. C.) 220; and see § 121, *ante.*

9 Howard *v.* Shaw, 8 Mees. & W. 122; § 121, *ante.*

10 Winterbottom *v.* Ingham, 7 Q. B. 611; Hough *v.* Birge, 11 Vt. 190; Sylvester *v.* Ralston, 31 Barb. 286; Coffman *v.* Huck, 24 Mo. 496. Compare Stone *v.* Sprague, 20 Barb. 509.

11 Dwight *v.* Cutler, 3 Mich. 566; Howard *v.* Shaw, 8 Mees. & W. 122.

12 Howard *v.* Shaw, 8 Mees. & W. 122; Bancroft *v.* Wardwell, 13 Johns. 489; Smith *v.* Stewart, 6 Johns. 46; Brewer *v.* Conover, 15 Pa. St. 215.

13 Daniels *v.* Pond, 21 Pick. 367; Phillips *v.* Covert, 7 Johns. 1.

14 Lady Shrewsbury's Case, 5 Rep. 13 *b*; Co. Litt. 57 *a*; Howell *v.* Howell, 7 Ired. 496; Cooper *v.* Adams, 6 Cush. 87.

§ 123. How determined.—A lease or estate which is at the will of one of the parties is equally at the will of the other party, and either of them may determine his will, and quit his connection with the other at his own pleasure.[1] So the tenancy will terminate on the death of either the lessor or lessee,[2] or by the desertion of the premises by the latter.[3] And if the lessee assigns over the land to another,[4] or commits an act of waste, his estate is thereby determined.[5] On the other hand, any act of ownership exercised by the lessor, which is inconsistent with the existence of the estate, will operate as a determination of it.[6] Any act done upon the land by him in assertion of his title to the possession determines the will.[7] So, in the absence of statutory provisions therefor, a tenant strictly at will is not entitled to notice to quit, but a mere demand of possession is sufficient.[8]

1 Price *v.* Price, 2 Maule & S. 464; 9 Bing. 356; Locke *v.* Matthews, 13 Com. B. N. S. 753; Doe *v.* Richards, 4 Ind. 374; Knight *v.* Indiana Coal etc. Co. 47 Ind. 105; 17 Am. Rep. 697.

2 Howard v. Merriam, 5 Cush. 563; Cody v. Quarterman, 12 Ga. 400; Roble v. Smith, 21 Me. 114; James v. Dean, 11 Ves. 391.

3 Say v. Stoddard, 27 Ohio St. 478; Chandler v. Thurston, 10 Pick. 205.

4 Cunningham v. Holton, 55 Me. 33; Cooper v. Adams, 6 Cush. 87; compare Pinhorn v. Souster, 20 Eng. L. & Eq. 561; 8 Ex. 772.

5 Daniels v. Pond, 21 Pick. 367.

6 Dorrell v. Johnson, 17 Pick. 263; Pollen v. Brewer, 7 Com. B. N. S. 371; Walden v. Bodley, 14 Peters, 162; Turner v. Doe, 9 Mees. & W. 643; Kelly v. Waite, 12 Met. 300; Holly v. Brown, 14 Conn. 255; Curtis v. Galvin, 1 Allen, 215.

7 Ball v. Cullimore, 2 Cromp. M. & R. 120; and see Daniels v. Davison, 16 Ves. 252; Benedict v. Morse, 10 Met. 223; Cook v. Cook, 28 Ala. 660; Rising v. Stannard, 17 Mass. 281. Compare Doe v. Thomas, 6 Ex. 854; Cheever v. Pearson, 16 Pick. 266.

8 Jackson v. French, 5 Wend. 337; Larned v. Hudson, 60 N. Y. 105; Rich v. Bolton, 46 Vt. 84; 14 Am. Rep. 615; and see Shorey v. Farrell, 114 Mass. 441; Coffin v. Lunt, 2 Pick. 70.

§ 124. Estate from year to year.—Under the operation of judicial decisions, estates at will, in the strict sense, have become almost extinguished, and tenancies from year to year have succeeded to them.[1] The reservation of an annual rent is regarded as an essential element of the latter,[2] and each party is bound to give reasonable notice (six months at common law) of an intention to terminate the tenancy.[3] A demise which fixes no definite term, but reserves an annual rent, payable quarterly, creates a tenancy from year to year.[4] So when a tenant, under a demise for a year or more, holds over after the end of his term, without any new agreement with the landlord, he may be treated as a tenant from year to year, and in all other respects as holding upon the terms of the original lease.[5] And he will be deemed such tenant, if the landlord either receives or distrains for rent accruing after the end of the original term.[6] There are also other ways in which the landlord may signify his assent to the tenancy, and it may, perhaps, be inferred from his silence and the mere lapse of time.[7] An entry and occupancy under a verbal lease, which is void because for a longer period than is allowed by statute, will support a holding from year to year until ended by notice;[8] and the tenancy will be subject to all the condi-

tions of the verbal lease except as to the term.[9] So if a tenant is in possession under a parol agreement void by the statute of frauds, paying the rent monthly, this creates a tenancy from month to month, which can only be terminated by proper notice.[10] The notice to quit necessary to determine a tenancy from year to year, which at common law was fixed at six months,[11] must expire at the end of the year.[12] In cases of tenancies for periods running less than a year, the notice must be regulated by the letting, and must be equivalent to a period.[13] Thus, notice is necessary to determine a monthly or weekly renting, and a month's or week's notice, respectively, is sufficient.[14] And a notice to quit on the day corresponding with the day of letting and entry, at the end of a recurring period of the holding, is held to be valid.[15] Parol notice is sufficient, unless required by agreement of parties or by statute to be in writing.[16] Notice must be served on the landlord's own tenant, and not on a sub-tenant of the lessee;[17] or if the notice is by the tenant, it must be to his immediate landlord.[18] The effect of a notice to quit may be waived, as where the landlord, by some act, recognizes the tenancy as continuing after the time of the notice has expired.[19] It is, however, a question of intention, and open to explanation.[20] If the tenant die within the time of the notice to quit, his rights for the remainder of the term would pass to his personal representatives.[21]

1 4 Kent Com. 112; Doe v. Green, 9 Ad. & E. 658; Doe v. Smaridge, 7 Ad. & E. N. S. 959; Right v. Darby, 1 Term R. 159; Ridgley v. Stillwell, 28 Mo. 400.

2 Daidge v. Bowers, 2 Mees. & W. 365; Pope v. Garland, 4 Younge & C. 394; Williams v. Devlar, 31 Mo. 1; Doe v. Baker, 4 Dev. 220; Silsby v. Allen, 43 Vt. 172; Rich v. Bolton, 46 Vt. 84; 14 Am. Rep. 615.

3 Johnstone v. Huddlestone, 4 Barn. & C. 922; Schuyler v. Smith, 51 N. Y. 309; 10 Am. Rep. 609; Hall v. Wadsworth, 28 Vt. 410; Holmes v. Day, 8 I. R. C. L. 235.

4 Lesly v. Randolph, 4 Rawle, 123; and see Jackson v. Bradt, 2 Caines, 169; Roe v. Lees, 2 Black. W. 1173.

5 Sullivan v. Cary, 17 Cal. 80; Jackson v. Salmon, 4 Wend. 327; Den v. McIntosh, 4 Ired. 291; Thomas v. Packer, 1 Hurl. & N. 669; Kelly v. Patterson, Law R. 9 P. C. 681; 10 Eng. R. 353; Patton v. Axley, 5 Jones (N. C.) 440; Laguerenne v. Dougherty, 35 Pa. St. 45; Witt v. Mayor etc. 6 Rob. (N. Y.) 441; Tolle v. Orth, 75 Ind. 298; 39 Am. Rep. 147; Schuyler v. Smith, 51 N. Y. 309; 10 Am. Rep. 609.

6 Conway v. Starkweather, 1 Denio, 113; Rowan v. Lytle, 11 Wend. 616; Russell v. Fabyan, 34 N. H. 223.

7 Rowan v. Lytle, 11 Wend. 616.

8 Schuyler v. Leggett, 2 Cow. 660; Craske v. Christian Union Publishing Co. 17 Hun, 319; Williams v. Ackerman, 8 Oreg. 405; Coan v. Mole, 39 Mich. 454.

9 Dorr v. Barney, 12 Hun, 259; Reeder v. Sayre, 6 Hun, 564; Lounsbery v. Snyder, 31 N. Y. 514.

10 People v. Darling, 47 N. Y. 666; and see Witt v. Mayor etc. 5 Rob. (N. Y.) 243; 6 Rob. (N. Y.) 441.

11 Doe v. Spence, 6 East, 120; Trousdale v. Darnell, 6 Yerg. 431; Hanchet v. Whitney, 1 Vt. 311; Jackson v. Bryan, 1 Johns. 322; Hunt v. Morton, 18 Ill. 75; Den v. McIntosh, 4 Ired. 291. In some of the States it is reduced to three months: Steffens v. Earl, 11 Vroom, 128; 29 Am. Rep. 214; Logan v. Herron, 8 Serg. & R. 458; Godard v. Railroad Co. 2 Rich. 346; Currier v. Perley, 24 N. H. 219.

12 Doe v. Watts, 7 Term Rep. 83; Floyd v. Floyd, 4 Rich. 23; Bessell v. Landsberg, 7 Q. B. 638; Baker v. Adams, 5 Cush. 99.

13 See Doe v. Donovan, 1 Taunt. 555: Currier v. Baker, 2 Gray, 224; Hanchet v. Whitney, 1 Vt. 311.

14 Doe v. Scott, 6 Bing. 362; Peacock v. Raffan, 6 Esp. 4; Walker v. Sharpe, 14 Allen, 43; Prindle v. Anderson, 23 Wend. 616; Steffens v. Earl, 11 Vroom, 128; 29 Am. Rep. 214.

15 Steffens v. Earl, 11 Vroom, 128; 29 Am. Rep. 214.

16 Timmins v. Rawlinson, 1 Black. W. 533; 3 Burr. 607.

17 Hatstat v. Packard, 7 Cush. 245; Pleasant v. Benson, 14 East, 234. See Doe v. Hughes, 7 Mees. & W. 139; Widger v. Browning, 2 Car. & P. 523.

18 Doe v. Milward, 3 Mees. & W. 328.

19 Doe v. Palmer, 16 East, 53; Prindle v. Anderson, 19 Wend. 391; Boynton v. Bodwell, 113 Mass. 531.

20 Doe v. Palmer, 16 East, 53; Kimball v. Rowland, 6 Gray, 224; Doe v. Batten, Cowp. 243. Compare Blyth v. Dennett, 22 Law J. R. (N. S.) 79; 16 Eng. L. & Eq. 424.

21 Cody v. Quarterman, 12 Ga. 386; Roble v. Smith, 21 Me. 114.

§ 125. Nature of tenancy at sufferance.—A tenant at sufferance is one who holds over by wrong, after the determination of his interest, having no estate, but a naked possession only, and standing in no privity to the landlord.[1] An illustration of this kind of tenancy is the case of a tenant *pur autre vie*, who continues in possession after the death of the *cestui que vie*.[2] So a tenant for years holding over after the expiration of his term becomes a tenant at sufferance;[3] so if a tenant at will continues in possession after the will is determined by the death of the lessor.[4] And if a person selling lands agrees to deliver them up to the grantee on a certain

day, but continues in possession after that day, he is a tenant at sufferance.[5] So if the mortgagor remains in possession after a sale of the mortgaged premises on foreclosure, he is a tenant at sufferance.[6] In short, any one who continues in possession without agreement, after a particular estate ended, is such a tenant.[7] Since the wrongful holding over is by the *laches* of the landlord, the tenant is not at common law liable for rent;[8] nor, on the other hand, is he entitled to emblements,[9] or notice to quit.[10] Before entry, the landlord cannot maintain an action of trespass against such a tenant;[11] but he may enter and dispossess the tenant by force, reap the crops, and thus determine the tenancy.[12] And having actually regained his possession, he may then have trespass against the tenant for the adverse holding.[13]

1 Wilde *v.* Cantillon, 1 Johns. Cas. 123; Jackson *v.* Parkhurst, 5 Johns. 128; Russell *v.* Fabyan, 34 N. H. 218; Doe *v.* Hull, 2 Dowl. & R. 38. See Smith *v.* Littlefield, 51 N. Y. 539; Bacon *v.* Bacon, 9 Conn. 334.

2 Co. Lit. 57 *b*; and see Rowan *v.* Lytle, 11 Wend. 617; Livingston *v.* Tanner, 12 Barb. 484.

3 Jackson *v.* Parkhurst, 5 Johns. 128; Jackson *v.* M'Leod, 12 Johns. 182; Hollis *v.* Pool, 3 Met. 350.

4 Co. Lit. 57 *b*; Benedict *v.* Morse, 10 Met. 223.

5 Wood *v.* Hyatt, 4 Johns. 312; 4 Johns. 150.

6 Kingsley *v.* Ames, 2 Met. 29.

7 Livingston *v.* Tanner, 12 Barb. 484; Hauxhurst *v.* Lobree, 38 Cal. 563; Simpkin *v.* Ashurst, 4 Tyrw. 781.

8 Livingston *v.* Tanner, 14 N. Y. 66; Rowan *v.* Lytle, 11 Wend. 617; Flood *v.* Flood, 1 Allen, 217; Finch's Case, 2 Leon. 143. Compare Delano *v.* Montague, 4 Cush. 42.

9 Doe *v.* Turner, 7 Mees. & W. 226.

10 Kelly *v.* Waite, 12 Met. 300; Young *v.* Smith, 28 Mo. 65; Livingston *v.* Tanner, 14 N. Y. 64; Kunzie *v.* Wixom, 39 Mich. 384; State *v.* Moore, 41 N. J. L. 515.

11 Jackson *v.* Parkhurst, 5 Johns. 128; and see Livingston *v.* Tanner, 14 N. Y. 66.

12 Hyatt *v.* Wood, 4 Johns. 150; Clapp *v.* Paine, 18 Me. 264; Beecher *v.* Parmele, 9 Vt. 352; Edwards *v.* Hale, 9 Allen, 462; Duncan *v.* Blachford, 2 Serg. & R. 480; Johnson *v.* Hannahan, 1 Strob. 313; Pollen *v.* Brewer, 7 Com. B. N. S. 371. The landlord in such case is not liable in an action to the other party, though he might thereby subject himself to indictment for breach of the peace: Sterling *v.* Warden, 51 N. H. 217; 12 Am. Rep. 95, 96; Harvey *v.* Bridges, 14 Mees. & W. 442. Compare Newton *v.* Harland, 1 Man. & G. 644; Beecher *v.* Parmele, 9 Vt. 352.

13 Hey *v.* Moorehouse, 6 Bing. N. C. 52; Dowell *v.* Johnson, 17 Pick. 265; Pearce *v.* Ferris, 10 N. Y. 280.

§ 126. License.—A license is an authority given to do some one act, or a series of acts, on the land of another, without passing any estate in the land;[1] such as a license to hunt in another's land, or to cut down a certain number of trees.[2] A license may be created by parol,[3] and is often implied by the act of the owner of the land.[4] It is so much a matter of personal trust and confidence that it does not extend to any one but the licensee,[5] and is not capable of being assigned or transferred by the person to whom it is granted.[6] It is likewise personal as to the grantor.[7] But although ordinarily regarded as personal, it will nevertheless apply to and protect the agents and servants of the licensee, whenever, from the circumstances, it can be presumed that there was an implied license to such persons.[8] A mere license cannot be ripened into a right by lapse of time.[9]

1 Cook *v.* Stearns, 11 Mass. 533, 537; Cheever *v.* Pearson, 16 Pick. 273; Bridges *v.* Purcell, 1 Dev. & B. 496; Mumford *v.* Whitney, 15 Wend. 380; 30 Am. Dec. 60. See as to distinction between license and easement: Doolittle *v.* Eddy, 7 Barb. 74.

2 Cook *v.* Stearns, 11 Mass. 537; Prince *v.* Case, 10 Conn. 378; Emerson *v.* Fisk, 6 Me. 200; 19 Am. Dec. 206.

3 Doolittle *v.* Eddy, 7 Barb. 74; Cheever *v.* Pearson, 16 Pick. 273; Wood *v.* Leadbitter, 13 Mees. & W. 838; Hill *v.* Hill, 113 Mass. 103; 18 Am. Rep. 455; Bachelder *v.* Sanborn, 24 N. H. 479.

4 Gowen *v.* Philadelphia Exchange Co. 5 Watts & S. 143; Harris *v.* Gillingham, 6 N. H. 9; 23 Am. Dec. 700. A license from a mother to a son, to open the family tomb to deposit the corpse of a deceased son, will be implied from the relation of the parties, the exigencies of the case, and the usages and customs of a civilized community: Lakin *v.* Ames, 10 Cush. 198.

5 Ruggles *v.* Lesure, 24 Pick. 190; Emerson *v.* Fisk, 6 Me. 200; Coleman *v.* Foster, 37 Eng. L. & Eq. 489; Harris *v.* Gillingham, 6 N. H. 9; 23 Am. Dec. 700.

6 Harris *v.* Gillingham, 6 N. H. 11; Jackson *v.* Babcock, 4 Johns. 418; Mendenhall *v.* Klinck, 51 N. Y. 246; Hill *v.* Cutting, 113 Mass. 107; Foot *v.* New Haven etc. R. R. Co. 23 Conn. 214.

7 Yeakle *v.* Jacob, 33 Pa. St. 376; Riddle *v.* Brown, 20 Ala. 412.

8 Sterling *v.* Warden, 51 N. H. 217; Curtis *v.* Galvin, 1 Allen, 217.

9 Coalter *v.* Hunter, 4 Rand. 58; 15 Am. Dec. 726; and see Partridge *v.* First Ind. Church, 39 Md. 49; Prince *v.* Case, 10 Conn. 375.

§ 127. Revocation of license.—A license is in its nature revocable, and so long as it remains executory, may be revoked at the pleasure of the licensor.[1] But an

executed license cannot be revoked; in other words, an act lawful when it was done, in virtue of the license and permission of the owner of the land, cannot be rendered unlawful by a subsequent revocatian of such authority.[2] So a license often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident.[3] And such a license may be transferred and assigned.[4] A familiar instance is where one sells chattels on his own land, in which case the accompanying license cannot be revoked until the purchaser has had a reasonable time to enter and remove them.[5] And as a general rule, the licensee should have a reasonable time for removing off the premises of another what he has been licensed to put thereon.[6] So in many cases the principles of an equitable estoppel are applied, and it is held that one cannot recall the license where he permits another on its faith to erect buildings, dams, or other improvements on his land.[7] Thus it was held that a parol license, without consideration, to use the waters of a stream for a saw-mill, cannot be revoked at the grantor's pleasure, where the grantee, in consequence of the license, has erected a mill.[8] But a license to erect a dam for temporary purposes ends by the decay of the dam, and will not authorize the erection of another dam in its place.[9] The death of either party will of itself revoke the license;[10] and a transfer or alienation of the interest of the licensor in the subject-matter of the license revokes it.[11] One who enters upon the land of another to remove buildings he has erected there, under a parol license from the owner, cannot be held liable in trespass;[12] but if resisted, he cannot enforce his claim by a breach of the peace, as by an assault and battery.[13]

1 Drake *v.* Wells, 11 Allen, 141; Hill *v.* Hill, 113 Mass. 103; Bartlett *v.* Prescott, 41 N. H. 493; Mumford *v.* Whitney, 15 Wend. 380; Hitchens *v.* Shaller, 32 Mich. 496; Smart *v.* Sandars, 5 Com. B. 894.

2 Cheever *v.* Pearson, 16 Pick 273; and see Kent *v.* Kent, 18 Pick. 569.

3 Wood v. Manley, 11 Ad. & E. 34; Wood v. Leadbitter, 13 Mees. & W. 845; Hewitt v. Johnson, 7 Ex. 75; Jackson v. Babcock, 4 Johns. 418; Ferris v. Irving, 28 Cal. 645.

4 Miller v. State, 39 Ind. 267; Beattie v. Butler, 21 Mo. 313; Thompson v. McElarney, 82 Pa. St. 174; Boults v. Mitchell, 15 Pa. St. 371; Heflin v. Bingham, 56 Ala. 566.

5 Claflin v. Carpenter, 4 Met. 583; Parsons v. Camp, 11 Conn. 525; Nettleton v. Sikes, 8 Met. 34; Greeley v. Stilson, 27 Mich. 153; Harmon v. Harmon, 61 Me. 222; Owens v. Lewis, 49 Ind. 489; 15 Am. Rep. 295; Long v. Buchanan, 27 Md. 502.

6 Mellor v. Watkins, Law R. 9 Q. B. 400; 9 Eng. R. 344; and see Clark v. Vt. R. R. Co. 28 Vt. 103; Folsom v. Moore, 19 Barb. 252; Gardner v. Rowland, 3 Ired. 247. A parol license to enter upon land "at any and all times," and cut and carry away growing wood, if not acted upon within a period of more than three years, may be revoked: Hill v. Hill, 113 Mass. 103; 18 Am. Rep. 455.

7 See Wilson v. Chalfant, 15 Ohio, 247; Dark v. Johnston, 55 Pa. St. 154; Ocean Manuf. Co. v. Sprague Manuf. Co. 34 Conn. 524; Foster v. Browning, 4 R. I. 47; Ricker v. Kelly, 1 Me. 117; 10 Am. Dec. 38; 10 Am. Dec. 43, note; Rerick v. Kern, 14 Serg. & R. 267.

8 Rerick v. Kern, 14 Serg. & R. 267; 16 Am. Dec. 497; and see Thompson v. McElarney, 82 Pa. St. 174; Meig's Appeal, 62 Pa. St. 34; Kamphouse v. Gaffner, 73 Ill. 453; Hodgson v. Jeffries, 52 Ind. 34; Lee v. McLeod, 12 Nev. 280; Davis v. Souder, 10 Phila. 113; Hornback v. Cin. R. R. Co. 20 Ohio. St. 81; Raritan Water-power Co. v. Vegte, 21 N. J. Eq. 463. But see Merrill v. Calkins, 73 N. Y. 584; Huston v. Laffe, 46 N. H. 505. A mere license to drain is not made irrevocable because a valuable consideration is paid therefor: Wiseman v. Lucksinger, 84 N. Y. 31.

9 Hepburn v. McDowell, 17 Serg. & R. 383; 17 Am. Dec. 677.

10 Ruggles v. Lesure, 24 Pick. 190; Johnson v. Carter, 16 Mass. 443.

11 Drake v. Wells, 11 Allen, 141; and see Wolfe v. Frost, 4 Sand. Ch. 93; Emerson v. Fisk, 6 Me. 200; Wallis v. Harrison, 4 Mees. & W. 538.

12 Sterling v. Warden, 51 N. H. 217; 12 Am. R. 80; Marston v. Gale, 24 N. H. 176; Bishop v. Babcock, 22 Vt. 295; Freeman v. Headley, 4 Vroom, 524; Owens v. Lewis, 49 Ind. 489.

13 Hamilton v. Wendolf, 36 Md. 301; Churchill v. Hulbert, 110 Mass. 42; Commonw. v. Haley, 4 Allen, 318.

CHAPTER XIII.

FRANCHISES.

§ 128. Nature of.
§ 129. By whom held.
§ 130. Ferries.
§ 131. Bridges.
§ 132. Fishery.
§ 133. Subject to eminent domain.
§ 134. How lost.

§ 128. Nature of.—Franchises are classed among incorporeal hereditaments,[1] and are defined to be special

privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally of common right.[2] It is essential to the character of a franchise that it should be a grant from the sovereign authority,[3] and in this country no franchise can be held which is not derived from a law of the State.[4]

1 See 2 Dane Abr. 683; Pim *v.* Currell, 6 Mees. & W. 234; Day *v.* Stetson, 8 Me. 368; People *v.* Utica Ins. Co. 15 Johns. 387; Gibbs *v.* Drew, 16 Fla. 147; 26 Am. Rep. 700.

2 Bank of Augusta *v.* Earle, 13 Peters, 595.

3 Chicago City Railw. Co. *v.* People, 73 Ill. 541; Boone Corp. § 35.

4 Penna. R. R. Co. *v.* Nat. Railway Co. 23 N. J. Eq. 441; Bank of Middletown *v.* Edgerton, 30 Vt. 182; Bank of Augusta *v.* Earle, 13 Peters, 595; People *v.* Utica Ins. Co. 15 Johns. 387.

§ 129. By whom held.—In England a franchise is a royal privilege, or a branch of the royal prerogative, subsisting in a subject by grant from the crown.[1] The kinds are various, and they may be vested in natural persons, or in bodies politic.[2] In this country they are usually conferred upon corporations created for the purpose of exercising them;[3] such, for instance, as bridge, railroad, or turnpike corporations.[4]

1 2 Blackst. Com. 37; Greenl. Cruise, 56.

2 People *v.* Utica Ins. Co. 15 Johns. 287; Chicago City Railw. Co. *v.* People, 73 Ill. 541; Cal. State Tel. Co. *v.* Alta Tel. Co. 22 Cal. 398.

3 See Binghamton Bridge, 3 Wall. 73, 74; Warner *v.* Beers, 23 Wend. 103.

4 Charles River Bridge *v.* Warren Bridge, 11 Peters, 420; Chenango Bridge Co. *v.* Paige, 83 N. Y. 178; Newburgh Turnpike Co. *v.* Miller, 1 Johns. Ch. 101; Enfield Toll Bridge Co. *v.* Hartford etc. R. R. Co. 17 Conn. 40; Gibbs *v.* Drew, 16 Fla. 147; 26 Am. Rep. 700; Boone Corp. § 238.

§ 130. Ferries.—At common law a ferry is deemed a franchise, which no man may set up for all passengers, without prescription time out of mind or a license from the king.[1] It is itself an incorporeal hereditament, and therefore real estate.[2] The franchise consists in the right to transport persons, etc., for hire, and therefore the property in the waters may be in one, and the right of ferry in another.[3] The franchise is subject to the control of the legislature, which may so regulate it that no rival

ferries or bridges can be established within certain fixed distances.[4] The owner of a ferry established by law has a right to protection, and the erection of another ferry so near it as materially to take away its custom is a nuisance, against which a court of equity will relieve by injunction.[5] A person owning land on both sides of a fresh-water river may, without legislative authority, and even in defiance of legislative prohibition, maintain a ferry for his own use, providing he does not interfere with the public easement;[6] but he cannot, without legislative authority, maintain a ferry for public use.[7] A grant of a public ferry is not exclusive, but subject to such further grants as public convenience may require.[8] And generally, where a franchise has been granted solely for public convenience, there can be no demand for its depreciation in value from the subsequent grant of a similar franchise.[9] If the proprietor of a ferry misuse or abuse the franchise, the government may repeal the grant and deprive him of it.[10] And the right to the franchise is held to be forfeited by an unreasonable delay in putting the ferry in use.[11]

1 See Binghamton Bridge Co. 3 Wall. 51; Bell *v.* Clegg, 25 Ark. 26; Chenango Bridge Co. *v.* Paige, 83 N. Y. 178; Sullivan *v.* Lafayette County, 58 Miss. 790; Munroe *v.* Thomas, 5 Cal. 470; Laredo *v.* Martin, 52 Tex. 548; Day *v.* Stetson, 8 Me. 367; Haithcock *v.* Swift Island Manuf. Co. 72 N. C. 410.

2 2 Dane Abr. 683; Rees *v.* Lawless, Litt. Sel. Cas. 184; 12 Am. Dec. 295; Coe *v.* Columbus etc. 10 Ohio St. 379. No set form of words is necessary to make a grant of a ferry franchise; any words are sufficient which clearly manifest the intention of the legislature: McGowen *v.* Stark, 1 Nott & McC. 387; 9 Am. Dec. 712.

3 Fay, Petitioner, 15 Pick. 253; State *v.* Wilson, 42 Me. 9; Mills *v.* County Commrs, 3 Scam. 53; Alexandria etc. Ferry Co. *v.* Wisch. 73 Mo. 655; Chenango Bridge Co. *v.* Paige, 83 N. Y. 178; Peter *v.* Kendal, 6 Barn. & C. 703. Compare Pipkin *v.* Wynns, 2 Dev. 402. One ferry consists of one line of boats on one line of travel: Price *v.* Knott, 8 Oreg. 438.

4 Binghamton Bridge Co. 3 Wall. 51; Haynes *v.* Wells, 26 Ark. 464; Hudson *v.* Cuero Land etc. Co. 47 Tex. 56; 26 Am. Rep. 289; Chenango Bridge Co. *v.* Paige, 83 N. Y. 178; and see Newburgh Turnp. Co. *v.* Miller, 5 Johns. Ch. 100; Townsend *v.* Blemott, 6 Miss. 503.

5 Ogden *v.* Gibbons, 4 Johns. Ch. 160; Ward *v.* Severance, 7 Cal. 126; McRoberts *v.* Washburne, 10 Minn. 23; Collins *v.* Ewing, 51 Ala. 101; Newport *v.* Taylor, 16 Mon. B. 781; Midland etc. Co. *v.* Wilson, 28 N. J. Eq. 537; Newburgh Turnp. Co. *v.* Miller, 5 Johns. Ch. 100; 9 Am. Dec. 274. See as to remedy at common law by an action on the case: Tay-

lor v. Wilmington R. R. Co. 4 Jones (N. C.) 277; Ferry Co. v. Barker, 2 Ex. 136.

6 Chenango Bridge Co. v. Paige, 83 N. Y. 178; 38 Am. Rep. 407; Binghamton Bridge Co. 3 Wall. 51. One may lawfully transport his own goods habitually in his own boat where another has an exclusive right of ferry: Alexandria etc. Ferry Co. v. Wisch, 73 Mo. 655; 39 Am. Rep. 535.

7 Chenango Bridge Co. v. Paige, 83 N. Y. 178; Bell v. Clegg, 25 Ark. 26.

8 Bush v. Peru etc. 3 Ind. 21; Callender v. Marsh, 1 Pick. 432. But compare Dartmouth College v. Woodward, 4 Wheat. 638; Boston etc. R. R. Co. v. Salem etc. R. R. Co. 2 Gray, 1. The license to keep a ferry confers a privilege only, exclusive while enjoyed, but subject to modification or revocation when required by the public interest: Sullivan v. LaFayette County, 58 Miss. 790.

9 Dyer v. Tuscaloosa Bridge Co. 2 Port. 296; 27 Am. Dec. 655. It seems that, from the similarity between a ferry and a pontoon bridge, a legislative grant to one of the privilege of establishing the latter impliedly repeals a former grant to another of the privilege of establishing the former: Hudson v. Cuero Land etc. Co. 47 Tex. 56; 26 Am. Rep. 289.

10 See 2 Greenl. Cruise, 65; Peter v. Kendal, 6 Barn. & C. 703.

11 Clarke v. Calloway, 1 Sneed, 46; 2 Am. Dec. 706.

§ 131. Bridges.—The right to erect a bridge across a stream of water to accommodate public travel, and to demand toll of persons passing, is also a franchise;[1] and the law applicable to the case of ferries is, in substance, applicable to bridges.[2] They are authorized under legislative sanction mainly for the benefit of the public, whose interest is their first and paramount object;[3] and it is therefore held to be within the power of the legislature to impair a ferry privilege by granting a charter to build a bridge where ferries have been kept.[4] Thus, it may authorize the erection of a toll-bridge at the crossing of a stream by a public highway, and that without compensation to the riparian owners who are operating a ferry at the crossing, the value of which will be impaired by the bridge.[5] Nor is the grant of a right to establish a ferry upon a river necessarily an infringement of the rights of a company to which has been granted the "exclusive right and privilege of building and of maintaining a bridge" across the same river, provided the charter of the bridge company is silent on the subject.[6] So a new bridge may be chartered, though it destroy the value of an old

one.[7] And a franchise to erect a bridge, and prohibiting the erection of any other bridge within one mile, is not interfered with by granting to a railroad company the right to construct a railroad bridge within that distance.[8] A grant to erect a toll-bridge does not confer, as an incident to such franchise, the power to build and rent wharves.[9]

1 East Rome Town Co. *v.* Nagle, 58 Ga. 474; Fall *v.* Sutter, 21 Cal. 237; Harrell *v.* Ellsworth, 17 Ala. 576; Cayuga Bridge Co. *v.* Stout, 7 Cowen, 33.

2 See § 130, *ante*.

3 Platt *v.* Covington etc. Bridge Co. 8 Bush, 31; and see Turnp. Co. *v.* State, 3 Wall. 210.

4 Jones *v.* Keith, 37 Tex. 399; 14 Am. Rep. 382; and see Charles River Bridge *v.* Warren Bridge, 11 Peters, 420; Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. 547.

5 Jones *v.* Keith, 37 Tex. 399; 14 Am. Rep. 382; Platt *v.* Covington etc. Bridge Co. 8 Bush, 31.

6 Parrott *v.* City of Lawrence, 2 Dill. 332.

7 Fort Plain Bridge Co. *v.* Smith, 30 N. Y. 44. But a free bridge cannot be erected, without authority from the legislature, so near an authorized toll-bridge as to interfere with the franchise of the latter: Townsend *v.* Blewett, 5 How. (Miss.) 503. See also Chenango Bridge Co. *v.* Lewis, 63 Barb. 111; Commonw. *v.* Inhabitants etc. 6 Allen, 449.

8 Lake *v.* Virginia etc. R. R. Co. 7 Nev. 294.

9 Toll-Bridge Co. *v.* Osborn, 35 Conn. 7.

§ 132. Fishery.—A free fishery, or exclusive right of fishing in a public river, is a franchise frequently vested in private persons, either by a grant or by prescription.[1] It has been distinguished from a *several* fishery, by connecting the latter with the ownership of the soil, and from a *common* of fishery, because it is an exclusive right, while the common is not.[2] In England, it seems to be settled that the sovereign has no power, since Magna Charta, to grant a portion of the soil covered with navigable waters, so as to give the grantee an immediate and exclusive right of fishery within the limits of the grant.[3] And it has been held in some of the States that no exclusive fishery in navigable rivers and arms of the sea could now be either prescribed for or granted by the State.[4] But it has been held in other States that such right might be claimed by grant or prescription, notwithstanding the

provision of Magna Charta.[5] And although the right of fishery in the navigable waters of the State is common to all its citizens, it is clearly the right of any citizen to acquire an exclusive property in oysters which he has planted upon beds, distinctly designated by stakes, where no oysters were growing at the time;[6] and he may maintain an action against one who takes them away and converts them to his own use.[7] But merely clearing out a fishing place in a river, by one not owning the bank, does not give an exclusive right of fishery.[8] The right of fishery in a fresh-water river, above the ebb and flow of the tide, is, at common law, in the owner or owners of the banks.[9] But the whole subject of fishery is to a great extent made the subject of legislative control, including fisheries even in rivers not navigable.[10] The right to a fishery implies only such an interest in the soil between high and low water, opposite the fishery, as is necessary to the use thereof;[11] and therefore a devise of "my fishing place" passes only the last-named interest.[12] A right of fishery growing out of an ownership of the soil is subject to dower.[13]

1 3 Kent Com. 408; 2 Greenl. Cruise, 57; 2 Blackst. Com. 34.

2 2 Blackst. Com. 34; Ang. Watercourses, § 75. See Melvin v. Whiting, 7 Pick. 79; Hart v. Hill, 1 Whart. 132; Seymour v. Courtenay, 5 Burr. 2814; Bennett v. Caster, 8 Taunt. 183; Smith v. Kemp, 2 Salk. 637; McDouall v. Lord Advocate, Law R. 2 Sc. App. 431; 13 Eng. R. 124.

3 Duke of Somerset v. Fogwell, 5 Barn. & C. 884; Blundell v. Catterall, 5 Barn. & Ald. 294, 309; and see Martin v. Waddell, 16 Peters. 410.

4 See Collins v. Benbury, 3 Ired. 277; Shrunk v. Schuylkill Nav. Co. 14 Serg. & R. 71; Cates v. Wadlington, 1 McCord, 580.

5 Rogers v. Jones, 1 Wend. 255; Phipps v. State, 22 Md. 389; Stoughton v. Baker, 4 Mass. 522; Chalker v. Dickinson, 1 Conn. 382. See 3 Kent Com. 416.

6 Decker v. Fisher, 4 Barb. 592; State v. Sutton, 2 R. I. 434; McCarty v. Holman, 22 Hun, 53.

7 McCarty v. Holman, 22 Hun, 53. A grant from the Crown to a town, of the right of fishery within its borders, subsequently ratified by the colonial and State authorities, is valid, and a party who, by lease or permit from the town, has planted oysters under the waters of its harbor can maintain an action against a party interfering with such oysters: Robins v. Ackerly, 12 N. Y. Week. Dig. 394; 24 Hun, 499.

8 Westfall v. Van Anker, 12 Johns. 425.

9 Commonw. v. Chapin, 5 Pick. 199; 16 Am. Dec. 386; Waters v.

Lilly, 4 Pick. 145; Moulton v. Libbey, 37 Me. 472; Adams v. Pease, 2 Conn. 481. See Marsh v. Colby, 39 Mich. 626; 33 Am. Rep. 439.

10 See Dunham v. Lamphere, 3 Gray, 268; Lunt v. Hunter, 16 Me. 1; Hooker v. Cummings, 20 Johns. 101; People v. Hannaford, 18 Me. 106; People v. Reed, 47 Barb. 235; Woolever v. Stewart, 36 Ohio St. 146; Rogers v. Jones, 1 Wend. 37; Doughty v. Conover, 42 N. J. L. 192; Weller v. Snover, 42 N. J. L. 341. It is within the power of the legislature to authorize such a use of a stream which is not navigable as will wholly destroy a public fishery: Howes v. Grush, 131 Mass. 207.

11 Hart v. Hill, 1 Whart. 137.

12 Hart v. Hill, 1 Whart. 137.

13 Bac. Abr. Dower; Ang. Watercourses, § 68.

§ 133. Subject to eminent domain.—It is well settled that a franchise may be taken in virtue of the sovereign right of eminent domain, whenever the legislature shall deem that the public exigencies require it.[1] Thus, a franchise to maintain a toll-bridge within certain limits may be appropriated for the public use, upon just compensation being made therefor.[2] And legislative grants generally, which are beyond the reach of ordinary legislation, are not exempt from the right of eminent domain.[3]

1 Crosby v. Hanover, 36 N. H. 454; Bonaparte v. Camden etc. Railw. Co. 1 Bald. 205; Little Miami etc. R. R. Co. v. Dayton, 23 Ohio St. 510.

2 Enfield Toll Bridge Co. v. Hartford etc. R. R. Co. 17 Conn. 40, 454; Red River Bridge Co. v. Mayor etc. 1 Sneed. 176; Boone Corp. § 94.

3 N. Y. etc. R. R. Co. v. Boston etc. R. R. Co. 36 Conn. 196.

§ 134. How lost.—Franchises may be lost by a voluntary surrender of them;[1] and if there is either a misuser or an abuse of a franchise, it is lost.[2] So an abuse in a particular department of an entire franchise is held to be a cause of forfeiture of the whole.[3] Non-user is likewise held to be a cause of forfeiture of a franchise.[4]

1 Savage v. Walshe, 26 Ala. 691; McCurdy v. Myers, 44 Pa. St. 535; Webster v. Turner, 12 Hun, 264; Boone Corp. § 201.

2 Boone Corp. § 233; State Bank v. State, 1 Blackf. 270.

3 People v. Bristol etc. Turnp. 23 Wend. 222.

4 Territt v. Taylor, 9 Cranch. 43; Boone Corp. § 203; and see Clarke v. Calloway, 1 Sneed. 45; 2 Am. Dec. 706. A franchise is not subject to an ordinary execution unless made so by statute: Munroe v. Thomas, 5 Cal. 470; Hatcher v. R. R. Co. 62 Ill. 477; Gue v. Tide Water Canal Co. 24 How. 257; Phila. etc. R. R. Co.'s Appeal, 70 Pa. St. 355. Compare Stewart v. Jones, 40 Mo. 140.

CHAPTER XIV

EASEMENTS.

§ 135. Definition and nature.
§ 136. How acquired.
§ 137. By prescription.
§ 138. Custom.
§ 139. Dedication.
§ 140. Effect of dividing estate.
§ 141. Easements in water.
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§ 146. Mines and mining rights.
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§ 135. Definition and nature.—In legal contemplation, an easement is the right of making use of the land of others, whether it be that of the public or of individuals, for a precise and definite purpose, not inconsistent with a general right of property in the owner.[1] As an essential quality thereof, there must be two distinct tenements; namely, the dominant, to which the right belongs; and the servient, upon which the obligation rests.[2] Considered relatively to the latter, the easement is a charge or obligation curtailing the ordinary right of property;[3] but with respect to the former, it is a right accessorial to such ordinary rights.[4] Easements are among the most important of incorporeal hereditaments, and although imposed upon corporeal property, they confer no right to a participation in the profits arising from such property.[5] In this respect they are to be distinguished from what are called "*profits a prendre*," which consist of a right to take the fruit or products of the land, or the materials which compose it.[6] So an easement, which is an interest in lands, and which can only be created by writing, or acquired by prescription,[7] is distinguished from a license, which may

be created by parol, and is a mere authority to enter on the lands of another, without possessing any interest in the land.[8] And a license, though given by deed, confers no more permanent right than if created by parol.[9] Another distinction is, that a license may in general be revoked at the will of the licensor, and is not assignable;[10] but an easement once granted is an estate which cannot be abridged or taken away by the grantor, nor has he power to say who shall or shall not enjoy it.[11] Interests in land, to which the term easements is applied at common law, are by the civil law denominated "servitudes."[12] A servitude is defined to be a burden affecting lands, by which the proprietor is restrained from the full use of his property, or is obliged to suffer others to do acts upon it.[13]

1 Boston Water Power Co. *v.* Boston etc. R. R. 16 Pick. 525. See also Pierce *v.* Keator, 70 N. Y. 419; 26 Am. Rep. 612; Wolfe *v.* Frost, 4 Sand. Ch. 89; Case of Private Road, 1 Ashm. 417; Cook County *v.* Railroad Co. 35 Ill. 464; Cary *v.* Daniels, 5 Met. 236; Phillips *v.* Phillips, 48 Pa. St. 178; Hewlins *v.* Shippam, 5 Barn. & C. 229; Mounsey *v.* Ismay, 3 Hurl. & C. 497.

2 Wolfe *v.* Frost, 4 Sand. Ch. 89; Child *v.* Chappell, 9 N. Y. 246; Wagner *v.* Hanna, 38 Cal. 116; Smith *v.* Wiggin, 48 N. H. 109; Hills *v.* Miller, 3 Paige, 254; Dark *v.* Johnston, 55 Pa. St. 164; Rangeley *v.* Midland Railw. Law R. 3 Ch. 310.

3 Watts *v.* Kelson, Law R. 6 Ch. 166.

4 Watts *v.* Kelson, Law R. 6 Ch. 166; and see Ritger *v.* Parker, 8 Cush. 147.

5 Hewlins *v.* Shippam, 5 Barn. & C. 221; Wagner *v.* Hanna, 38 Cal. 116; Wolfe *v.* Frost, 4 Sand. Ch. 72; Bowen *v.* Team, 6 Rich. 298.

6 Waters *v.* Lilley, 4 Pick. 145; Pierce *v.* Keator, 70 N. Y. 419; 26 Am. Rep. 612; Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 39; Hill *v.* Lord, 48 Me. 99; Bland *v.* Lipscombe, 30 Eng. L. & Eq. 189; Huff *v.* McCauley, 53 Pa. St. 209; Manning *v.* Wasdale, 5 Ad. & E. 758.

7 See § 136, *post*; Sargent *v.* Ballard, 9 Pick. 255; Morse *v.* Copeland, 2 Gray, 302.

8 Dolittle *v.* Eddy, 7 Barb. 74; § 127, *ante*.

9 San Francisco *v.* Canavan, 42 Cal. 543.

10 Hazleton *v.* Putnam, 3 Chand. 117; Ex parte Coburn, 1 Cowen, 568; Foster *v.* Browning, 4 R. I. 47; § 127, *ante*.

11 Rowbotham *v.* Wilson, 8 El. & B. 123; Wallis *v.* Harrison, 4 Mees. & W. 538.

12 See Taylor *v.* Hampton, 4 McCord, 96; 17 Am. Dec. 710; Vincent *v.* Michel, 7 La. 52; 26 Am. Dec. 496; Adams *v.* Van Alstyne, 25 N. Y. 235, 236.

13 Laumier *v.* Francis, 23 Mo. 181; Hills *v.* Miller, 3 Paige, 254; 24 Am. Dec. 218. Compare Nellis *v.* Munson, 24 Hun, 575. The owner in

fee of land may impose upon it any burden, however injurious or destructive, not inconsistent with his general right of ownership, if such burden is not in violation of public policy, and does not injuriously affect the rights or property of others: Van Rensselaer *v.* Albany etc. R. R. Co. 1 Hun, 509.

§ 136. How acquired.—An easement, being an interest in land, can be acquired only by grant.[1] Even in cases of prescription, dedication, and the like, although there actually never was a deed in existence, yet the presumption of law is that it did exist, and its production is excused because it is lost or is withheld by the party to be charged.[2] It is not, however, necessary that the grant of an easement should be made in express words;[3] for it is a familiar maxim of the law that the grant of a thing carries with it everything necessary to its reasonable enjoyment.[4] Upon a conveyance of land, whatever is in use for it, as an incident or appurtenance, passes with it;[5] and whether an easement is embraced in a deed, is always a question of construction, having reference to the terms of the deed and the practical incidents belonging to the grantor of the land at the time of the conveyance.[6] The court will look at the surrounding circumstances existing when the deed was made, the situation of the parties, and the subject-matter of the conveyance.[7] And an easement may be created by reservation; as in the case of a grant of land bounding on or near a pond and stream, reserving the mill and water privilege, is a reservation of the right of flowing those lands, so far as is necessary or convenient, or so far as it has been usual to flow them for that purpose.[8] But easements which will pass by implication in a grant will not be implied by a reservation.[9] Thus, where the owner of land conveys away a portion of his premises, a part of which at the time of the conveyance is flowed by a mill-dam belonging to him, and makes no reservation of the right to continue to flow the land, he loses the right, and cannot set up an implied reservation.[10] But if the owner had sold and conveyed the mill to a third person, it would have been

otherwise, as the right to flow the land would have then passed as an incident to the purchaser of the mill, and could not have been cut off by the grantor.[11] It requires stronger words to create an easement by reservation than by direct grant.[12] Whether an easement is a personal right, or is to be construed as appurtenant to some other estate, must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances.[13]

1 Adams v. Andrews, 15 Q. B. 284; Rowbotham v. Wilson, 8 H. L. Cas. 362; Cook v. Prigden, 45 Ga. 331; Lobdell v. Hall, 3 Nev. 507; Fuhr v. Dean, 26 Mo. 116. The creation of an easement by express grant requires a deed or conveyance in writing, and a consent in writing merely would be of no more avail than one given by parol: Wiseman v. Lucksinger, 84 N. Y. 31; Banghart v. Flummerfelt, 43 N. J. L. 28; Gerrard v. Cocke, 2 Bos. & P. N. R. 109. See Bell v. Woodward, 47 N. H. 332. The production of the grant is the proper evidence of the existence of the easement: Lyman v. Arnold, 5 Mason, 195; Garland v. Furber, 47 N. H. 304.

2 Beaudely v. Brook, Cro. Jac. 180; Sargent v. Ballard, 9 Pick. 255; Strickler v. Todd, 10 Serg. & R. 69; Wallace v. Harmstad, 44 Pa. St. 496.

3 Rowbotham v. Wilson, 8 H. L. Cas. 362.

4 Pomfret v. Ricroft, 1 Saund. 323, note; Nichols v. Luce, 24 Pick. 102; Alley v. Carleton, 29 Tex. 78; Thompson v. Banks, 43 N. H. 540; Pingree v. McDuffie, 56 N. H. 306.

5 Huttemeier v. Albro, 2 Bosw. 546; 18 N. Y. 48; and see Voorhees v. Burchard, 55 N. Y. 98; Crossley v. Lightowler, Law R. 2 Ch. 486; Wheeldon v. Burrows, Law R. 12 Ch. Div. 31.

6 Huttemeier v. Albro, 2 Bosw. 546; 18 N. Y. 48.

7 Bradley v. Washington Packet Co. 13 Pet. 54; Bell v. Woodward, 47 N. H. 332.

8 Pettee v. Hawes, 13 Pick. 323. Compare Owen v. Field, 102 Mass. 107; Randall v. Latham, 36 Conn. 53; Durham etc. Railw. v. Walker, 2 Q. B. 967.

9 Burr v. Mills, 21 Wend. 290; and see Suffield v. Brown, 4 DeGex, J. & S. 185; Ellis v. Manchester Carriage Co. Law R. 2 C. P. D. 13; Wheeldon v. Burrows, Law R. 12 Ch. Div. 31; Mitchell v. Seipel, 53 Md. 251; 36 Am. Rep. 404.

10 Burr v. Mills, 21 Wend. 290.

11 Burr v. Mills, 21 Wend. 290.

12 Suffield v. Brown, 4 DeGex, J. & S. 185.

13 Peck v. Conway, 119 Mass. 546. Compare Wagner v. Hanna, 38 Cal. 117; Spensley v. Valentine, 34 Wis. 154; Sharp v. Ropes, 110 Mass. 381; Thorpe v. Brumfit, Law R. 8 Ch. 650; Keates v. Lyon, Law R. 4 Ch. 218.

§ 137. By prescription.—Easements are often acquired by prescription, which has its foundation in the

presumption of a previous grant or agreement, lost by lapse of time.[1] The possession or use necessary to confer a title by prescription must be long, continuous, peaceable, open, by the knowledge and tacit consent and without the express permission of the true owner.[2] Anciently the claimant was required to show use for a time beyond the memory of man;[3] but the modern rule, derived by analogy from the limitation prescribed by statute for actions of ejectment,[4] is that an enjoyment, as above described, for the term of twenty years raises a legal presumption that the right was originally acquired by title.[5] And in many cases such presumption has been held to be conclusive.[6] The right once acquired, it is indifferent whether its origin was in an actual grant or arose from prescription.[7]

1 Powell *v.* Bagg, 8 Gray, 443; Tyler *v.* Wilkinson, 4 Mason, 397; Tracy *v.* Atherton, 36 Vt. 503; Campbell *v.* Wilson, 3 East, 294; Hillary *v.* Waller, 12 Ves. 239; Wallace *v.* Fletcher, 30 N. H. 446. But a grant cannot be presumed against a person legally incapable of making it: Rochdale Canal *v.* Radcliff, 18 Q. B. 315; Edson *v.* Mansell, 10 Allen, 557, 568.

2 Parker *v.* Foote, 19 Wend. 309; Wheeler *v.* Clark, 58 N. Y. 267; Campbell *v.* West, 44 Cal. 646; Williams *v.* James, Law R. 2 Com. P. 581; Haag *v.* Delorme, 30 Wis. 591. It seems that to constitute an easement by prescription, it is not essential that the user should have been with the actual knowledge of the owner of the servient tenement. Where the *user* has been for the requisite time open, notorious, visible, uninterrupted, undisputed, and under claim of right adverse to such owner, he is charged with notice, and his acquiescence is implied: Ward *v.* Warren, 82 N. Y. 265.

3 Edson *v.* Munsell, 10 Allen, 560; Mayor etc. *v.* Horner, Cowp. 109; American Co. *v.* Bradford, 27 Cal. 367.

4 See Coolidge *v.* Learned, 8 Pick. 508; Edson *v.* Munsell, 10 Allen, 568.

5 Coe *v.* Wolcottville Manuf. Co. 35 Conn. 175; Hoy *v.* Sterrett, 2 Watts, 330; Ricard *v.* Williams, 7 Wheat. 110; Bright *v.* Walker, 1 Cromp. M. & R. 217; Parker *v.* Foote, 19 Wend. 309; Manler *v.* Myers, 4 Mon. B. 514; Lehigh Valley R. R. Co. *v.* McFarlan, 43 N. J. L. 604. The period of presumption is twenty-one years in Pennsylvania: Okeson *v.* Patterson, 29 Pa. St. 22.

6 See Tyler *v.* Wilkinson, 4 Mason, 402; Garrett *v.* Jackson, 20 Pa. St. 331; Bealey *v.* Shaw, 6 East, 215; Townsend *v.* Downer, 32 Vt. 183; Ward *v.* Warren, 82 N. Y. 268. But compare Doe *v.* Reed, 5 Barn. & Ald. 232; Tinkham *v.* Arnold, 3 Mc. 123.

7 Aynsley *v.* Glover, Law R. 18 Eq. 544; 11 Eng. 521. The public cannot acquire an easement by prescription. A prescription supposes a grant, and in the case of the public there can be no grantee: Curtis *v.* Keesler, 14 Barb. 521.

§ 138. Custom.—Rights in the nature of easements may exist by custom.[1] Thus, the inhabitants of a certain locality may acquire a right of way across a parcel of land by custom.[2] And a custom may run in favor of all fishermen within a certain district;[3] or in favor of the inhabitants of a parish, to play at all lawful games at all reasonable times on a tract of land.[4] The right is acquired by actual enjoyment, undisputed for a sufficient period of time, as in the case of prescriptive rights;[5] but no grant is presumed, and there is no dominant estate, in which respects customary rights differ from prescriptive rights.[6] A custom must be reasonable in its subject-matter,[7] and also in its mode of enjoyment.[8] Thus, a custom to carry away the soil or its products is unreasonable and invalid;[9] and so of a custom for all the inhabitants of a town to go, at their pleasure, upon the land of another to exercise horses.[10] A person may claim an easement by prescription, as appurtenant to his particular estate, although other persons claim the same right by custom;[11] for different persons may claim an easement by different rights.[12]

1 See Smith *v.* Gatewood, Cro. Jac. 152; Perley *v.* Langley, 7 N. H. 233; Lockwood *v.* Wood, 6 Q. B. 65.

2 Smith *v.* Gatewood, Cro. Jac. 152; and see Emans *v.* Turnbull, 2 Johns. 313.

3 Constable *v.* Nicholson, 14 Com. B. N. S. 239. Compare Manning *v.* Wasdale, 5 Ad. & E. 758; Post *v.* Pearsall, 22 Wend. 432.

4 Fitch *v.* Rawling, 2 Black. H. 393; and see Blundell *v.* Catterall, 5 Barn. & Ald. 268; Race *v.* Ward, 4 El. & B. 702; Mounsey *v.* Ismay, 32 Law J. Ex. 94.

5 Lockwood *v.* Wood, 6 Q. B. 65. Compare Penna. Coal Co. *v.* Sanderson, 94 Pa. St. 302; 39 Am. Rep. 785.

6 See Pearsall *v.* Post, 20 Wend. 128; 22 Wend. 432; Grimstead *v.* Marlow, 4 Term Rep. 719; Curtis *v.* Keesler, 14 Barb. 521; Shurmeier *v.* St. Paul etc. R. R. 10 Minn. 82.

7 Waters *v.* Lilly, 4 Pick. 145; Cadman *v.* Evans, 5 Allen, 310; Jones *v.* Robin, 10 Q. B. 620; and see State *v.* Wilson, 42 Me. 9.

8 Bell *v.* Wardell, Willes, 202; Lockwood *v.* Wood, 6 Q. B. 64; Jones *v.* Percival, 5 Pick. 485.

9 Blewett *v.* Tregonning, 3 Ad. & E. 554; Jones *v.* Robin, 10 Q. B. 620; Hill *v.* Lord, 48 Me. 100.

10 Sowerby *v.* Coleman, Law R. 2 Ex. 99. Compare Mounsey *v.* Ismay, 32 Law J. Ex. 94.

11 Kent *v.* Waite, 10 Pick. 142.

12 Kent v. Waite, 10 Pick. 142; and see Blewett v. Tregonning, 3 Ad. & E. 554; Perley v. Langley, 7 N. H. 235.

§ 139. Dedication.—The easement by prescription is always to individuals or to corporations, and to those who are not incompetent to receive a grant;[1] and the only way in which the *public* can, at common law, acquire an easement in the lands of another is by dedication.[2] Dedication is, therefore, defined to be an act by which the owner of the fee gives to the public, for some proper object, an easement in his lands.[3] A parol dedication is good,[4] but the intention to dedicate must be unequivocally and satisfactorily proved.[5] The proof may be by writing, or by public and unequivocal declarations or acts on the part of the owner of the land.[6] The effect of a dedication is not to deprive a party of title to his land,[7] but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has.[8] A dedication must be to the public generally, and not to a part of them only;[9] and it must be completed by the acceptance of the public.[10] Acceptance may be proved by parol,[11] by long public use, or by acts of recognition on the part of the proper public officers,[12] or it may be presumed from the beneficial nature of the dedication.[13] A dedication of land to public uses may be revoked before acceptance by the public,[14] but not afterward;[15] and there cannot be a dedication with a right reserved to destroy or resume it.[16] The purposes for which the public may use the land may be limited,[17] and where the dedication is in terms absolute, it is limited by the nature of the use to which it is given.[18] Thus, land dedicated for sites for court-houses or other public buildings could not be used for the burial of the dead.[19] Generally speaking, all sorts of easements and rights to the enjoyment of land, whether of use or of pleasure, which may be acquired by an individual by grant or prescription, may also be acquired by the public by actual dedication.[20]

1 See Pearsall v. Post, 20 Wend. 121; 22 Wend. 431, 432; § 138, *ante*.

2 Post v. Pearsall, 22 Wend. 444; Curtis v. Keesler, 14 Barb. 521; Warren v. Jacksonville, 15 Ill. 236.

3 Curtis v. Keesler, 14 Barb. 521. No one but the owner of the fee can make the dedication: Schenley v. Commonw. 36 Pa. St. 29; San Francisco v. Calderwood, 31 Cal. 589; Baugan v. Mann, 59 Ill. 492; Kyle v. Logan, 87 Ill. 64; Fisk v. Havana, 88 Ill. 208.

4 Curtis v. Keesler, 14 Barb. 521; State v. Catlin, 3 Vt. 530; 23 Am. Dec. 230; Waugh v. Leech, 28 Ill. 492; State v. Trask, 6 Vt. 355; 27 Am. Dec. 554; Harding v. Jasper, 14 Cal. 642.

5 Morse v. Ranno, 32 Vt. 606; Cook v. Harris, 61 N. Y. 448; Bermondsey v. Brown, Law R. 1 Eq. 215; Proctor v. Lewiston, 25 Ill. 153; Mayor of Madison v. Booth, 53 Ga. 609; Mansur v. State, 60 Ind. 357; McCormick v. Baltimore, 45 Md. 512; Niagara Falls etc. Bridge Co. v. Bachman, 66 N. Y. 261.

6 Godfrey v. Alton, 12 Ill. 29; Commonw. v. Rush, 14 Pa. St. 186; Bissell v. N. Y. Cent. R. R. Co. 26 Barb. 635; Bayard v. Hargrove, 45 Ga. 342; In re Ingraham, 4 Hun, 495; Callaway County v. Nolley, 31 Mo. 393; Portland v. Whittle, 3 Oreg. 126; Morgan v. Railroad Co. 96 U. S. 716.

7 Dubuque v. Benson, 23 Iowa, 248; Curtis v. Keesler, 14 Barb. 521; Regina v. Pratt, 4 El. & B. 868. See Bayard v. Hargrove, 45 Ga. 342; Bartlett v. Bangor, 67 Me. 460.

8 Cincinnati v. White, 6 Peters, 442; Hunter v. Sandy Hill, 6 Hill, 407; Beal v. Stewart, 6 Lans. 408; St. Mary Newington v. Jacobs, Law R. 7 Q. B. 47; West Covington v. Freking, 8 Bush, 128; Connehan v. Ford, 9 Wis. 240; Mercer v. Pittsburg R. R. Co. 36 Pa. St. 99.

9 Trustees etc. v. Hoboken, 33 N. J. L. 13.

10 San Francisco County v. Calderwood, 31 Cal. 589; Child v. Chappell, 9 N. Y. 256; Green v. Chelsea, 24 Pick. 71; Derby v. Alling, 40 Conn. 410; Dodge v. Stacey, 39 Vt. 574; Baker v. St. Paul, 8 Minn. 494.

11 Cook v. Harris, 61 N. Y. 448; Irwin v. Dixion, 9 How. 31.

12 Cook v. Harris, 61 N. Y. 448; Stone v. Brooks, 35 Cal. 489; In re Ingraham, 4 Hun, 495; Buchanan v. Curtis, 25 Wis. 99; Reese v. Chicago, 38 Ill. 322; Tillman v. People, 12 Mich. 401. User alone is sufficient to establish a dedication; but if there be no other evidence of the fact, it must have continued for twenty years: Gould v. Glass, 19 Barb. 179; Hoole v. Att.-Gen. 22 Ala. 190; Day v. Allender, 22 Md. 526; Hanson v. Taylor, 23 Wis. 548. Compare Buchanan v. Curtis, 25 Wis. 107; Mayberry v. Standish, 56 Me. 342; San Francisco v. Calderwood, 31 Cal. 589.

13 Child v. Chappell, 9 N. Y. 246; and see Guthrie v. New Haven, 31 Conn. 321; Fairfield v. Morey, 44 Vt. 239.

14 Baker v. St. Paul, 8 Minn. 494; Bridges v. Wyckoff, 67 N. Y. 130; San Francisco v. Carnavan, 42 Cal. 541.

15 Beall v. Clore, 6 Bush, 680; New Orleans v. United States, 10 Peters, 662; Wilder v. St. Paul, 12 Minn. 200; Missouri Institute v. Howe, 27 Mo. 211.

16 San Francisco v. Canavan, 42 Cal. 541; Mercer v. Woodgate, Law R. 5 Q. B. 26.

17 Trustees etc. v. Hoboken, 33 N. J. L. 13; Hemphill v. Boston, 8 Cush. 185; Barraclough v. Johnson, 8 Ad. & E. 99; Stafford v. Coyney, 7 Barn. & C. 257; Arnold v. Holbrook, Law R. 8 Q. B. 96; 4 Eng. 236.

18 See Cincinnati v. White, 6 Peters, 431; Commonw. v. Alburger, 1 Whart. 467; Bayard v. Hargrove, 45 Ga. 342; Gardiner v. Tisdale, 2 Wis. 153; Price v. Thompson, 48 Mo. 361; Stevens v. Nashua, 46 N. H. 195.

Equity will enforce the proper use: Carter v. City of Portland, 4 Oreg. 339.

19 See Monkato v. Willard, 13 Minn. 13; Abbott v. Mills, 3 Vt. 521; Hurdy v. Memphis, 10 Heisk. 127; Watertown v. Cowen, 4 Paige, 510; City of Morrison v. Hinkson, 87 Ill. 587; 29 Am. Rep. 77.

20 Post v. Pearsall, 22 Wend. 482; Mowry v. City of Providence, 10 R. I. 52; and see Blundell v. Caterall, 5 Barn. & Ald. 268; Gould v. Boston, 120 Mass. 302; Rowan v. Portland, 8 Mon. B. 232; Hoadley v. San Francisco, 50 Cal. 265; Price v. Plainfield, 40 N. J. L. 608; Mankato v. Willard, 13 Minn. 23; Boyce v. Kalbaugh, 47 Md. 334; 28 Am. Rep. 464.

§ 140. Effect of dividing estate.—A party cannot have an easement in his own land, inasmuch as all the uses of an easement are fully comprehended in his general right of ownership.[1] But where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits which appear at the time of the sale to belong to it, as between it and the property which the vendor retains.[2] All continuous or apparent easements—in other words, all easements necessary to the reasonable enjoyment of the premises granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted—will pass to the grantee under the grant.[3] Thus, where the same person possesses a house having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights.[4] But the rule above stated is not for the benefit of purchasers only, but is entirely reciprocal.[5] Hence, if instead of a benefit conferred a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it.[6] The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially

the relative value of the respective parts.[7] If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant;[8] and to this rule, the only exception is of ways or easements of necessity.[9]

1 Oliver *v.* Hook, 47 Md. 308; Mabie *v.* Matteson, 17 Wis. 1; Crippen *v.* Morse, 49 N. Y. 63; Lampman *v.* Milks, 21 N. Y. 507; Murphy *v.* Welch, 128 Mass. 489.

2 Lampman *v.* Milks, 21 N. Y. 507; Outerbridge *v.* Phelps, 58 How. Pr. 77; Penna. R. R. Co. *v.* Jones, 50 Pa. St. 424; Pherysey *v.* Vicary, 16 Mees. & W. 484; Bliss *v.* Kennedy, 43 Ill. 71; Perrin *v.* Garfield, 37 Vt. 312; Cave *v.* Crafts, 53 Cal. 135.

3 Janes *v.* Jenkins, 34 Md. 1; Watts *v.* Kelson, Law R. 6 Ch. 166; Wheeldon *v.* Burrows, Law R. 12 Ch. Div. 31; Phillips *v.* Phillips, 48 Pa. St. 178; Harwood *v.* Benton, 32 Vt. 733; and see Goodal *v.* Godfrey, 53 Vt. 219; 38 Am. Rep. 671. Compare Green *v.* Collins, 86 N. Y. 246; Barkley *v.* Wilcox, 86 N. Y. 140.

4 Swansborough *v.* Coventry, 9 Bing. 305; and see Elliott *v.* Sallee, 14 Ohio St. 10; Standiford *v.* Goudy, 6 W. Va. 364; Jones *v.* Jenkins, 34 Md. 1; Thompson *v.* Miner, 30 Iowa, 386; Richards *v.* Rose, 9 Ex. 218.

5 Lampman *v.* Milks, 21 N. Y. 507. But see § 142, *post*.

6 Lampman *v.* Milks, 21 N. Y. 507; Butterworth *v.* Crawford, 46 N. Y. 349; 7 Am. Rep. 352; and see Suffield *v.* Brown, 4 DeGex, J. & S. 185; Watts *v.* Kelson, Law R. 6 Ch. 166.

7 Lampman *v.* Milks, 21 N. Y. 507; Shaw *v.* Etheridge, 3 Jones, (N. C.) 300; Burwell *v.* Hobson, 12 Gratt. 322; Roberts *v.* Roberts, 55 N. Y. 275.

8 Wheeldon *v.* Burrows, Law R. 12 Ch. Div. 31; Crossly *v.* Lightowler, Law R. 2 Ch. 474; French *v.* Morris, 101 Mass. 68; Mitchell *v.* Seipel, 53 Md. 251; 36 Am. Rep. 404; Mixer *v.* Reed, 25 Vt. 254; § 136, *ante*. But see Seibert *v.* Levan, 8 Pa. St. 383; Peyer *v.* Carter, 1 Hurl. & N. 916.

9 Davis *v.* Sear, Law R. 7 Eq. 427; Pinnington *v.* Galland, 9 Ex. 1; Wheeldon *v.* Burrows, Law R. 12 Ch. Div. 31; Randall *v.* McLaughlin, 10 Allen, 366; Corbrey *v.* Willis, 7 Allen, 364; Marshall *v.* Trumbull, 28 Conn. 183; McDonald *v.* Lindall, 3 Rawle, 402. The necessity must be absolute, and mere convenience is not enough: Dodd *v.* Burchell, 1 Hurl. & C. 113; Suffield *v.* Brown, 4 DeGex, J. & S. 185; Mitchell *v.* Seipel, 53 Md. 251; 36 Am. Rep. 404.

§ 141. Easements in water.—The right which a party has to the use of water flowing over his own land is undoubtedly identified with the realty, and is a real or corporeal hereditament, and not an easement.[1] The right is inseparably annexed to the soil, and is parcel of the land itself.[2] But no proprietor has the right to use the water to the prejudice of any other proprietor above or below him,[3] unless he has acquired a right to use the water in some peculiar manner, and differently from what he would be

entitled to do as mere riparian proprietor.[4] This right he may, however, acquire, by an actual grant or license from the proprietor affected by his operations,[5] or by an uninterrupted adverse enjoyment for such a length of time as would afford a presumption of a grant,[6] which in England and in most of the States is a period of twenty years;[7] in other words, an easement is created in favor of the owner of the dominant estate.[8] An easement to foul or corrupt the water of a stream may be thus acquired;[9] so of an easement to discharge water upon the land of another, either by an artificial channel, or by a pipe, or by drip from a roof;[10] or to maintain water at a given height in a mill-dam.[11] And a mill owner may thus acquire a right to discharge water from his mill by a raceway through the land of another.[12] And a right to maintain an aqueduct through another's land may be acquired by a user of twenty years or more.[13] So the right to throw water back upon the land of another may be acquired by grant, and long usage may be evidence of such a grant.[14] A title may be gained by twenty years' user, as well to artificial water-courses as to natural ones.[15] And it was held that the proprietor of lands below may, by prescription, acquire the right to have water, which in its natural course flowed through and over his lands, diverted from its natural course, and thrown back upon the lands of the proprietor above.[16] But the doctrine of prescription, or presumption of a grant from lapse of time, has not been deemed applicable to the case of underground waters percolating through the earth.[17] As it respects such waters, no rights are gained, since no one can be presumed to have granted that of the existence of which he must have been ignorant.[18]

1 Wadsworth *v.* Tillotson, 15 Conn. 366; Hill *v.* Newman, 5 Cal. 445; Watkins *v.* Holman, 16 Peters, 25; Johnson *v.* Jordon, 2 Met. 239; Gardner *v.* Newburgh, 2 Johns. Ch. 161; 7 Am. Dec. 526; Tyler *v.* Wilkinson, 4 Mason, 397; Vansickle *v.* Haines, 7 Nev. 249; Stokoe *v.* Singers, 8 El. & B. 36; Sampson *v.* Hoddinott, 1 Com. B. N. S. 608.

2 Wadsworth *v.* Tillotson, 15 Conn. 366; Johnson *v.* Jordon, 2 Met. 239.

3 Webb v. Portland Manuf. Co. 3 Sum. 189; Bowman v. City of New Orleans, 27 La. An. 501; Porter v. Durham, 74 N. C. 767; Hart v. Evans, 8 Pa. St. 13; Davis v. Winslow, 51 Me. 291; Miner v. Gilmour, 12 Moore P. C. C. 131.

4 Wadsworth v. Tillotson, 15 Conn. 366; Watkins v. Peek, 13 N. H. 360.

5 See Avon Manuf. Co. v. Andrews, 30 Conn. 476; Johnstown Cheese Manuf. Co. v. Veghte, 69 N. Y. 16; Bobo v. Wolf, 18 Ohio St. 463; Hines v. Robinson, 57 Me. 324; Houston v. Laffee, 46 N. H. 505; Mason v. Hill, 5 Barn. & Adol. 1.

6 Wadsworth v. Tillotson, 15 Conn. 366; White v. Chapin, 12 Allen, 516; Bucklin v. Truell, 54 N. H. 122; Steffy v. Carpenter, 37 Vt. 41. In Connecticut, such enjoyment need not have been adverse: Parker v. Hotchkiss, 25 Conn. 321. See also Perrin v. Garfield, 37 Vt. 308.

7 Mason v. Hill, 5 Barn. & Adol. 1; Townsend v. McDonald, 12 N. Y. 381; Pillsbury v. Moore, 44 Me. 154; Campbell v. Smith, 8 N. J. L. 140; Cuthbert v. Lawton, 3 McCord, 194; Law v. McDonald, 9 Hun, 23. In Texas and in Louisiana, the period is ten years: Haas v. Choussard, 17 Tex. 588; Delahoussaye v. Judice, 13 La. An. 537. In Connecticut, fifteen years: Wadsworth v. Tillotson, 15 Conn. 366. And in Pennsylvania, twenty-one years: Cooper v. Smith, 9 Serg. & R. 26.

8 See Law v. McDonald, 9 Hun, 23; Sargent v. Ballard, 9 Pick. 251; Thomas v. Thomas, 2 Cromp. M. & R. 34; Manning v. Wasdale, 5 Ad. & E. 758.

9 Merrifield v. Lombard, 13 Allen, 16; Moore v. Webb, 1 Com. B. N. S. 673; Crossley v. Lightowler, Law R. 2 Ch. 478; 3 Eq. Cas. 279. But actual disuse of the easement for twenty years, others in the mean time having acquired adverse rights thereto, destroys the right to the easement: Id.

10 Ashley v. Ashley, 6 Cush. 70; Cherry v. Stein, 11 Md. 1; Major v. Chardwick, 11 Ad. & E. 571; and see Smith v. Smith, 110 Mass. 302.

11 Stiles v. Hooker, 7 Cowen, 266. Compare Olney Mills etc. Co. v. Meese, 54 Ga. 459.

12 Prescott v. White, 21 Pick. 341. Compare Davis v. Getchell, 50 Me. 602; Prescott v. Williams, 5 Met. 429; Tillotson v. Smith, 32 N. H. 90.

13 Northam v. Hurley, 1 El. & B. 665; Watkins v. Peck, 13 N. H. 360; and see Ivimey v. Stocker, Law R. 1 Ch. 396.

14 Stiles v. Hooker, 7 Cowen, 266; Cowles v. Kidder, 24 N. H. 364.

15 Watkins v. Peck, 13 N. H. 360; Crittenton v. Alger, 11 Met. 281; Ivimey v. Stocker, Law R. 1 Ch. 396; Major v. Chardwick, 11 Ad. & E. 571.

16 Middleton v. Gregorie, 2 Rich. 631. Compare Belknap v. Trimble, 3 Paige, 605; Wood v. Wand, 3 Ex. 777; Greatrex v. Hayward, 8 Ex. 291; Acton v. Blundell, 12 Mees. & W. 324.

17 Broadbent v. Ramsbotham, 11 Ex. 602; Greenleaf v. Francis, 18 Pick. 122; Frazier v. Brown, 12 Ohio St. 311; Wheatley v. Baugh, 25 Pa. St. 528.

18 Smith v. Kenrick, 7 Com. B. 546; and see Rooth v. Driscoll, 20 Conn. 541.

§ 142. Light and air.—By the common law of England, as declared by the English courts, a right to have light and air pass to the windows of a house over adjoin-

ing land may be presumed from long and continuous adverse enjoyment, unexplained, where the house and the land belong to different persons;[1] and will arise by implication, without respect to the period of enjoyment, if the owner of both house and land sells the house, retaining the land.[2] The first branch of this doctrine, or that of ancient lights, was recognized as existing law in some of the earlier American decisions.[3] But the later and better considered decisions in most of the States have discarded the doctrine, and it is declared to form no part of the law of this country;[4] though, of course, an easement of light and air in this country may be acquired by express grant or covenant.[5] As it respects the second branch of the English doctrine above stated, or that of implied grant, it has been fully accepted in some of the American cases,[6] while in others it has been wholly rejected,[7] or limited to cases of real necessity.[8] The simplest rule, and one best suited to a country like ours, in which changes are continually taking place in the ownership and use of lands, is that no right of this character can be acquired without express grant of an interest in or covenant relating to the lands over which the right is claimed.[9]

1 Renshaw *v.* Bean, 18 Q. B. 131; Barker *v.* Richardson, 4 Barn. & Adol. 579; Lanfranchi *v.* Mackenzie, Law R. 4 Eq. 421; Cook *v.* Mayor, Law R. 9 Eq. 179. Now confirmed by statute, 2 and 3 Wm. 4, c. 71, s. 3. See Topling *v.* Jones, 20 Com. B. N. S. 165; 11 H. L. Cas. 290.

2 Leech *v.* Schweder, Law R. 9 Ch. 463; 9 Eng. R. 559; Hall *v.* Lund, 1 Hurl. & C. 676.

3 Robeson *v.* Maxwell, 2 N. J. Eq. 57; Barnett *v.* Johnson, 15 N. J. Eq. 481; Ray *v.* Lynes, 10 Ala. 63; Durel *v.* Boisblanc, 1 La. An. 407; Manier *v.* Myers, 4 Mon. B. 520; Gerber *v.* Grabel, 16 Ill. 217.

4 Parker *v.* Foote, 19 Wend. 309; Roy *v.* Sweeney, 14 Bush, 1; 29 Am. 388; Hubbard *v.* Town, 33 Vt. 295; Mullin *v.* Stricker, 19 Ohio St. 135; 2 Am. Rep. 379; Powell *v.* Sims, 5 W. Va. 1; 13 Am. Rep. 629; Cherry *v.* Stein, 11 Md. 1; Pierre *v.* Fernald, 26 Me. 436; Stein *v.* Hauck, 56 Ind. 65; 26 Am. Rep. 10; Morrison *v.* Marquardt, 24 Iowa, 35; Randall *v.* Sanderson, 111 Mass. 114.

5 See Mahan *v.* Brown, 13 Wend. 263; Parker *v.* Foote, 19 Wend. 309; Keats *v.* Hugo, 115 Mass. 216; 15 Am. Rep. 80.

6 Janes *v.* Jenkins, 34 Md. 1; 6 Am. Rep. 300; Story *v.* Odin, 12 Mass. 157; Oregon Iron Co. *v.* Trullinger, 3 Oreg. 1; Maynard *v.* Esher, 17 Pa. St. 222; United States *v.* Appleton, 1 Sum. 492. See § 140, *ante*.

7 Keats *v.* Hugo, 115 Mass. 204; 15 Am. Rep. 80; Johnson *v.* Oppen-

heim, 55 N. Y. 293; Doyle v. Lord, 64 N. Y. 432; Shipman v. Beers, 2 Abb. N. C. 435; Haverstick v. Sipe, 33 Pa. St. 368.

8 Powell v. Sims, 5 W. Va. 1; 13 Am. Rep. 629; and see § 140, *ante*; Havens v. Klein, 49 How. Pr. 95.

9 Gray, C. J., in Keats v. Hugo, 115 Mass. 204; 15 Am. Rep. 91.

§ 143. Ways as easements.—A right of way over another's land may be created by necessity, by grant, or by prescription.[1] A right of way by necessity arises where the owner of several parcels of land conveys one parcel which is surrounded by the others, having no way of ingress and egress but through one of those reserved.[2] The way is so far appurtenant to the land as to pass with it to the grantee.[3] So if the grantor reserves the parcel surrounded by the others for himself, he is entitled to a way through necessity.[4] Much depends, however, upon the facts of each particular case, as to when a way of necessity will arise;[5] though it seems to be settled that a reasonable necessity, as distinguished from mere convenience, is sufficient,[6] and there need not be an absolute and irresistible necessity.[7] In order to establish such easement, nothing is required but to show the necessity.[8] Neither time nor occupation are necessary, and although the right may never have been enjoyed, yet its existence will be co-extensive with the necessity.[9] The right of locating a way of necessity belongs to the owner of the land in the first instance, but the owner of the easement may select the place, if the other party refuses so to do.[10] A right of way by grant, which would usually be made by deed, derives no strength from time or occupation.[11] A grant of yesterday is of equal validity to one of a century past, and although the way may never have been enjoyed, the grant is conclusive of the right.[12] If the grant be lost or destroyed, the right may be established by secondary proof, according to the ordinary rules of evidence.[13] To entitle a person to a right of way by prescription, he must show an uninterrupted, adverse user for the requisite length of time,[14] and that he has always used the same without change or variation.[15] If the user

relied upon has been interrupted, the claimant must show that such interruptions were consistent with the title claimed by him.[16] A right of way acquired for one special purpose cannot be used for another and different purpose.[17] But a right of way for all purposes is not restricted to one purpose, because the owner thereof has had occasion for a long series of years to use it for that purpose only.[18] Whether the grant of a way be in gross, that is, attached to the person using it,[19] or is appurtenant to some other estate,[20] must be determined from the grant itself, and not by matters *aliunde*.[21] A right of way, appurtenant to land, is appurtenant to the whole and to every part of it, and if such land be divided and conveyed in separate parcels, a right of way thereby passes to each of the grantees.[22]

1 See 2 Blackst. Com. 36; Lawton v. Rivers, 2 McCord, 445; 13 Am. Rep. 741.

2 Hall v. McLead, 2 Met. (Ky.) 98; Collins v. Prentice, 15 Conn. 39; Bass v. Edwards, 126 Mass. 445; Worrall v. Rhoads, 2 Whart. 427; 30 Am. Dec. 274. See Stewart v. Hartman, 46 Ind. 331; Proctor v. Hodgson, 10 Ex. 822; 29 Eng. L. & Eq. 453.

3 Wissler v. Hershey, 23 Pa. St. 333; Taylor v. Warnaky, 55 Cal. 350; Simmons v. Sines, 4 Keyes, 153; 4 Abb. Ct. App. 246. Compare Anderson v. Buchanan, 8 Ind. 132; Brice v. Randall, 7 Gill. & J. 349; Kuhlman v. Hecht, 77 Ill. 570.

4 Howton v. Frearson, 8 Term Rep. 50; Lawton v. Rivers, 2 McCord, 445; 13 Am. Dec. 741; Pingree v. McDuffie, 56 N. H. 306. Compare § 140, *ante*.

5 See Pettingill v. Porter, 8 Allen, 6.

6 Lawton v. Rivers, 2 McCord, 445; 13 Am. Dec. 741; Dillman v. Hoffman, 38 Wis. 575; Oliver v. Pitman, 98 Mass. 50; Hollenbeck v. McDonald, 112 Mass. 250; Brown v. Berry, 6 Cold. 98; O'Rorke v. Smith, 11 R. I. 264.

7 Pettingill v. Porter, 8 Allen, 6; Lawton v. Rivers, 2 McCord, 445; 13 Am. Dec. 741.

8 Lawton v. Rivers, 2 McCord, 445; 13 Am. Dec. 741.

9 Sanxay v. Hunger, 42 Ind. 44; Derrickson v. Springer, 5 Har. (Del.) 21.

10 Smiles v. Hastings, 24 Barb. 44; Russell v. Jackson, 2 Pick. 578.

11 Sanxay v. Hunger, 42 Ind. 44; Lawton v. Rivers, 2 McCord, 445; 13 Am. Dec. 741.

12 Lawton v. Rivers, 2 McCord, 445; 13 Am. Dec. 741; and see Shepherd v. Watson, 1 Watts, 35.

13 Lawton v. Rivers, 2 McCord, 445; 13 Am. Dec. 741. A grant of a way, without other words indicating an intent to enlarge the natural import of the word, carries an easement only: Jamaica etc. Corp. v. Chandler, 9 Allen, 164; Gidney v. Earl, 12 Wend. 98.

14 Hill v. Crosby, 2 Pick. 466; Blake v. Everett, 1 Allen, 248; Campbell v. Wilson, 3 East, 294; Tracey v. Atherton, 36 Vt. 503; Krier's Private Road, 73 Pa. St. 109; and see § 137, *ante*.

15 Lawton v. Rivers, 2 McCord. 445; 13 Am. Dec. 741.

16 Puryear v. Clements, 53 Ga. 233; Plimpton v. Converse, 42 Vt. 712.

17 Ballard v. Dyson, 1 Taunt. 279; Atwater v. Bodfish, 11 Gray, 150; Allan v. Gomme, 11 Ad. & E. 759; French v. Marstin, 24 N. H. 440; 32 N. H. 316.

18 Holt v. Sargent, 15 Gray, 97.

19 See Boatman v. Lasley, 23 Ohio St. 614; White v. Crawford, 10 Mass. 183.

20 Sanxay v. Hunger, 42 Ind. 44.

21 Wagner v. Hanna, 38 Cal. 111.

22 Underwood v. Carney, 1 Cush. 285; Watson v. Bloren, 1 Serg. & R. 227.

§ 144. Lateral support of soil.—The right of an owner of land to the support of the land adjoining is *jure naturæ*, like the right of a flowing stream.[1] Each owner has the absolute right to have his land remain in its natural condition, unaffected by an act of his neighbor;[2] and, if the neighbor digs upon or improves his own land so as to injure this right, he may be held liable therefor in an action for damages, without proof of negligence.[3] But this right of property is only in the land in its natural condition, and the damages in such an action are limited to the injury to the land itself, and do not include any injury to buildings, or improvements thereon;[4] unless such buildings shall have stood and had the advantage of the support of the land adjoining for the period of time requisite to create a prescriptive right.[5] In short, for an excavation causing an injury to the soil in its natural state an action will lie;[6] but, without proof of a right by grant or prescription in the plaintiff, or of actual negligence on the part of the defendant, no action will lie for an injury to buildings by excavating adjoining land not previously built upon.[7] And the building, for which support is claimed, must have been properly erected, for if its defects are one cause of the injury, no damage can be claimed.[8] The doctrine that the owner of a building erected on the border line of his land can, by lapse of time, acquire a prescriptive right to the lateral support of

the adjacent soil, has been rejected in some of the States.[9] It is said that the English cases favoring the right are founded on analogy to the doctrine of ancient lights, which is not generally in force in this country.[10] And that, if a man is not content to enjoy his land in its natural condition, but wishes to build upon or improve it, he must either make an agreement with his neighbor, or dig his foundations so deep, or take such other precautions, as to insure the stability of his buildings or improvements, whatever excavations the neighbor may afterward make upon his own land in the exercise of his right.[11] But, in making excavations, the neighbor must exercise reasonable care and diligence, having reference to the situation of the estate.[12] And the owner of a lot, having a building with independent walls standing wholly upon it, is entitled to notice from the owner of an adjoining lot, who intends to build on the latter, and so improve it, as to make it necessary for the security of the former house that it should be shored up and supported during the progress of the work.[13] The one giving the notice, even in such a case, is also bound to exercise care and skill in improving his own lot; and for any injury resulting to the other from a breach of that duty he will be liable.[14] The same rule applies where two owners have two houses in juxtaposition, and one pulls down his house in a wasteful, negligent, or improper manner, thereby injuring the adjoining house.[15] And an artificial easement of mutual support may be acquired, by implied grant or prescription, where houses are erected by one owner, and so constructed as to require mutual support, and are then conveyed to different owners, or one is conveyed and the other is retained by the original owner.[16]

1 Panton *v.* Holland, 17 Johns. 92; Farrand *v.* Marshall, 19 Barb. 380; 21 Barb. 409; Thurston *v.* Hancock, 12 Mass. 226; 7 Am. Dec. 57; Gilmore *v.* Driscoll, 122 Mass. 199; 23 Am. Rep. 312.

2 Beard *v.* Murphy, 37 Vt. 104; Lasala *v.* Holbrook, 4 Paige, 169; Charless *v.* Rankin, 22 Mo. 566; Humphries *v.* Brogden, 12 Q. B. 743.

3 Gilmore *v.* Driscoll, 122 Mass. 199; 23 Am. Rep. 312; Richardson *v.* Vt. Cent. R. R. 25 Vt. 465; McGuire *v.* Grant, 25 N. J. L. 356; Transportation Co. *v.* Chicago, 99 U. S. 635.

4 Charless *v.* Rankin, 22 Mo. 566; Gilmore *v.* Driscoll, 122 Mass. 199, 23 Am. Rep. 312; Smith *v.* Thackerah, Law R. 1 Com. P. 564; Partridge *v.* Scott, 3 Mees. & W. 220.

5 Lasala *v.* Holbrook, 2 Paige, 173; Richart *v.* Scott, 7 Watts, 460; Shrieve *v.* Stokes, 8 Mon. B. 453; Hay *v.* Cohoes Co. 2 N. Y. 162; Humphries *v.* Brogden, 12 Q. B. 739; Bonomi *v.* Backhouse, El. B. & E. 622; 9 H. L. Cas. 503.

6 Wilde *v.* Minsterley, 2 Rolle Abr. 565; Thurston *v.* Hancock, 12 Mass. 229; 7 Am. Dec. 57; Foley *v.* Wyeth, 2 Allen, 131.

7 Dodd *v.* Holme, 1 Ad. & E. 493; Eliot *v.* Northeastern Railw. 10 H. L. Cas. 333; Hide *v.* Thornborough, 2 Car. & K. 250; Smith *v.* Thackerah, Law R. 1 Com. P. 564; Gilmore *v.* Driscoll, 122 Mass. 199; 23 Am. Rep. 312.

8 Richart *v.* Scott, 7 Watts. 460; Smith *v.* Hardesty, 31 Mo. 412.

9 Mitchell *v.* Mayor etc. 49 Ga. 19; 15 Am. Rep. 669; and see Gilmore *v.* Driscoll, 122 Mass. 199; 23 Am. Rep. 312.

10 Mitchell *v.* Mayor etc. 49 Ga. 19; 15 Am. Rep. 669; and see § 142, *ante*. Even in England it is held that for digging upon neighboring land, and thereby causing the plaintiff's land to sink and his buildings to fall, although the jury find that the land would have sunk if there had been no building upon it, yet no action will lie, if no appreciable damage is proved to the land without the building: Smith *v.* Thackerah, Law R. 1 Com. P. 564.

11 Gilmore *v.* Driscoll, 122 Mass. 199; 23 Am. Rep. 312.

12 Jeffries *v.* Williams, 5 Ex. 792; Peyton *v.* Mayor, 9 Barn. & C. 725; Thurston *v.* Hancock, 12 Mass. 226.

13 Eno *v.* Del Vecchio, 4 Duer, 66; 6 Duer, 17.

14 Massey *v.* Goyder, 4 Car. & P. 161; Charless *v.* Rankin, 22 Mo. 572.

15 Walters *v.* Pfeil, Moody & M. 362; and see Humphries *v.* Brogden, 12 Q. B. 751.

16 Richards *v.* Rose, 9 Ex. 218; 24 Eng. L. & Eq. 406; Solomon *v.* Vintners' Co. 4 Hurl. & N. 598; Webster *v.* Stevens, 5 Duer, 553. But it seems that no obligation or servitude of support of one building by another, in case of separate owners, arises from their mere juxtaposition, however long continued: see Peyton *v.* Major etc. 9 Barn. & C. 725; Chauntler *v.* Robinson, 4 Ex. 170; Napier *v.* Bulwinkle, 5 Rich. 324. Compare Angus *v.* Dalton, Law R. 3 Q. B. D. 85; 28 Eng. R. 80.

§ 145. Party walls.—Where the owners of adjoining lands agree to construct a wall partly on the land of each, for the common support of their buildings, the wall so constructed, if used as such for twenty years, is a party wall in the legal sense of the term, and the owner of each house has an easement for its support, in that portion of the wall which stands on the adjoining land.[1] So if the owner of two adjoining lots erects a building on each, with a wall partly on each lot for their common support, a conveyance by him of either lot conveys with the building an easement for its support on that part of the wall

which stands on the other lot.[2] The land covered by a party wall remains the several property of the owner of each half, yet the title of each owner is qualified by the easement to which the other is entitled;[3] and in all cases where such an easement exists, neither owner nor occupant can interfere with the wall to the detriment of the other without his assent.[4] The law will, however, permit either party to make any use of a party wall which he may require, either by deepening the foundation or increasing the height,[5] so far as it can be done without injury to the other.[6] But the party making the change, when not required for purposes of repair, is absolutely responsible for any damage it occasions.[7] Every separation wall between two buildings is presumed to be a party wall unless the contrary is shown;[8] and a wall may be a party wall for a part of its length or height, and not for the remainder.[9] And a wall which is on the dividing line at the bottom, but not perpendicular, and is wholly upon the estate of one owner at the top, may still be a party wall.[10] Parol agreements for party walls, when executed, have been sustained by the courts.[11] But it was held that a parol agreement by the owner of the adjoining land to pay for the part of the wall set upon his land does not run with the land nor bind his grantee.[12] In case a party wall is destroyed by fire, the easement in the wall ceases, and there is no implied obligation to contribute toward rebuilding it;[13] unless the two proprietors build at the same time, in which case it has been held that the one who builds the party wall may recover from the other a moiety of the cost.[14] So if the wall becomes ruinous or unsafe, it seems that one may rebuild and compel the other to contribute.[15] And if one owner of a party wall adds to it for his own use, he may maintain an action of contribution against the other owner who has used such additions for one-half the value of the additions when made.[16]

1 Eno *v.* Del Vecchio, 4 Duer, 53; Webster *v.* Stevens, 5 Duer, 553; and see Bloch *v.* Isham, 28 Ind. 37; Hicatt *v.* Morris, 10 Ohio St. 523.

2 Webster v. Stevens, 5 Duer, 553; Giles v. Dugro, 1 Duer. 331; Murly v. McDermott, 8 Ad. & E. 138; and see Wheeler v. Clark, 58 N. Y. 267.

3 Webster v. Stevens, 5 Duer, 553; Sherred v. Cisco, 4 Sand. 480; Brooks v. Curtis, 50 N. Y. 639; 10 Am. Rep. 545; compare Cubitt v. Porter, 8 Barn. & C. 257.

4 Webster v. Stevens, 5 Duer, 553; Partridge v. Gilbert, 15 N. Y. 601.

5 Matts v. Hawkins, 5 Taunt. 20; Brooks v. Curtis, 50 N. Y. 639; 10 Am. Rep. 545; Danenhauer v. Devine, 51 Tex. 480; 32 Am. Rep. 627; Phillips v. Bordman, 4 Allen, 147; Hicatt v. Morris, 10 Ohio St. 523.

6 Bradbee v. Christ's Hospital, 4 Man. & G. 761; Gorham v. Gross, 125 Mass. 232; 28 Am. Rep. 224; Dowling v. Hennings, 20 Md. 179.

7 Eno v. Del Vecchio, 6 Duer, 17.

8 Campbell v. Mesier, 4 Johns. Ch. 334; Schile v. Brokhahus, 80 N. Y. 614.

9 Weston v. Arnold, Law R. 8 Ch.1090; 7 Eng. 572; Price v. McConnell, 27 Ill. 255.

10 Gordon v. Milne, 1 L. & E. Rep. (Pa.) 643.

11 Rawson v. Bell, 46 Ga. 19; Polye v. Scheehy, 1 City Ct. R. (N. Y.) 98; Rindge v. Baker, 57 N. Y. 209; 15 Am. Rep. 475.

12 List v. Hornbook, 2 W. Va. 346. Compare Maine v. Cumston, 98 Mass. 317; Greenwald v. Kappes, 31 Ind. 216.

13 Ormun v. Day, 5 Fla. 385; Automarchi v. Russell, 63 Ala. 356; 35 Am. Rep. 40; Hoffman v. Kuhn, 57 Miss. 746; 34 Am. Rep. 491. See also Reynolds v. Fargo, 1 Sheld. (N. Y.) 531.

14 Huck v. Flentye, 80 Ill. 258.

15 Campbell v. Mesier, 4 Johns. Ch. 334; 8 Am. Dec. 570; Brooks v. Curtis, 50 N. Y. 639; 10 Am. Rep. 545.

16 Sanders v. Martin, 2 Lea, (Tenn.) 213; 31 Am. Rep. 598; and see Richardson v. Tobey, 121 Mass. 457; 23 Am. Rep. 283.

§ 146. Mines and mining rights.—It is not uncommon in mining districts for the ownership of the soil to be vested in one person and that of the mines in another.[1] And where the surface of land belongs to one and the minerals to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state.[2] If the owner of the entire fee grants the minerals, reserving the surface, his grantee is entitled only to so much of the minerals as he can get without injury to the surface.[3] So if the land owner sells the surface, reserving to himself the minerals, with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, so frame the reservation as to

show clearly that he is intended to have that power.[4] The word "surface" means not merely the geometrical superficies without thickness, but includes whatever earth, soil, or land lies above and superincumbent on the mine.[5] A right of way for mining purposes may be created by grant, express or implied;[6] or it may be established by prescription.[7] And special rights in the use of water for mining purposes may be so acquired.[8] A right to discharge water used for the precipitation of minerals, and thereby rendered noxious, may be gained by user.[9] So a right to throw refuse from mines into a natural stream may be asserted either by prescription or by custom.[10] On the mineral lands of the public domain in the Pacific States and Territories, the doctrine of right by prior appropriation, as it respects the use of the waters of a stream for mining purposes, is recognized and applied;[11] and the first appropriator has, by virtue of his appropriation, the right to the use and enjoyment of the water as against other claimants, to the full extent of his original appropriation,[12] and he has the right to insist that the quality of the water shall not be impaired so as to defeat the purpose of that appropriation.[13] Subject, however, to these rights, subsequent appropriators may use the channel and waters of the stream, and mingle with its waters other waters, and divert them as often as they choose.[14]

1 Ryckman *v.* Gillis, 57 N. Y. 68; 15 Am. Rep. 464; Adam *v.* Briggs Iron Co. 7 Cush. 361; Melton *v.* Lambard, 51 Cal. 258.

2 Horner *v.* Watson, 79 Pa. St. 242; 21 Am. Rep. 55; Jones *v.* Wagner, 66 Pa. St. 429; 5 Am. Rep. 385; Yandes *v.* Wright, 66 Ind. 319; 32 Am. Rep. 109; Wilms *v.* Jess, 94 Ill. 464; 34 Am. Rep. 242; Harris *v.* Ryding, 5 Mees. & W. 59; Smart *v.* Morton, 5 El. & B. 30; 30 Eng. L. & Eq. 385.

3 Coleman *v.* Chadwick, 80 Pa. St. 81; 21 Am. Rep. 93; Marvin *v.* Brewster Iron Mining Co. 55 N. Y. 538; 14 Am. Rep. 322; Zinc Co. *v.* Franklinite Co. 13 N. J. Eq. 342; Wakefield *v.* Duke of Buccleuch, Law R. 4 Eq. Cas. 613.

4 Hext *v.* Gill, Law R. 7 Ch. 699; and see Livingston *v.* Moingona Coal Co. 49 Iowa, 369; 31 Am. Rep. 150.

5 Humphries *v.* Brogden, 12 Q. B. 739; Yandes *v.* Wright, 66 Ind. 319; 32 Am. Rep. 109; Burkhardt *v.* Hanley, 23 Ohio St. 558.

6 Daud *v.* Kingscote, 6 Mees. & W. 196; Tracy *v.* Atherton, 35 Vt. 52; Ackroyd *v.* Smith, 10 Com. B. 164; Midgley *v.* Richardson, 14 Mees. & W. 595.

7 See Ogden v. Grove, 38 Pa. St. 487; Gayford v. Moffatt, Law R. 4 Ch. 133.

8 Sampson v. Burnside, 13 N. H. 264; McCullum v. Water Co. 54 Pa. St. 40; Baxendale v. McMurray, Law R. 2 Ch. 790.

9 Wright v. Williams, 1 Mees. & W. 77. See § 141, *ante;* Carlyon v. Lovering, 1 Hurl. & N. 798; Earl v. DeHart, 12 N. J. Eq. 285.

10 Carlyon v. Lovering, 40 Eng. L. & Eq. 448; 1 Hurl. & N. 784.

11 See Butte etc. Co. v. Vaughn, 11 Cal. 143; Union Water Co. v. Crary, 25 Cal. 505; Smith v. O'Hara, 43 Cal. 371; Lobdell v. Hall, 3 Nev. 507; Atchison v. Peterson, 20 Wall. 508.

12 Atchison v. Peterson, 20 Wall. 508; Woolman v. Garringer, 1 Mon. 535; Hill v. Smith, 27 Cal. 476; Lobdell v. Simpson, 2 Nev. 274.

13 Butte etc. Co. v. Vaughn, 11 Cal. 143. Compare Wixon v. Bear River etc. Co. 24 Cal. 367; Union Water Co. v. Crary, 25 Cal. 504; Water Co. v. Fletcher, 23 Cal. 481.

14 Atchison v. Peterson, 20 Wall. 508; 1 Mon. 561; and see Lobdell v. Simpson, 2 Nev. 274; Tenney v. Miner's Ditch Co. 7 Nev. 335.

§ 147. How lost or determined.—An easement is one of those rights which may be extinguished or taken away by the act of God, operation of law, or act of the party.[1] But the act of the party may effect an extinguishment of the right, where the act of God or of the law will only cause a suspension thereof.[2] Thus if the right be suspended by the act of God, as by the drying up of a spring, it will revive if the spring again flows; but if it be suspended by the act of the party, as by building a house or a wall, it would not be restored, although the obstacle be removed.[3] The reason for the distinction is, that the act of the party shall always be construed most strongly against himself, but he shall not be injured by an act of God or of the law.[4] And the easement may be destroyed either by an act of the party positively destructive of it,[5] or by an act incompatible with the nature or exercise of it.[6] It may, of course, be extinguished by a release given by the owner of the dominant estate to the one who owns the servient estate;[7] so it may be lost by abandonment,[8] or long-continued non-user.[9] But where the right is claimed by deed, mere non-user for any length of time will not impair or defeat it.[10] The non-user to have that effect must be in consequence of something which is adverse to the user on the part of the

owner of the servient estate, and continued for the period of prescription.[11] So long as the conduct and situation of the parties are consistent with the written title under which they claim, they will be presumed to hold under it and according to its terms.[12] An easement cannot be extinguished by a mere parol agreement;[13] but a license given by the owner of the dominant to the owner of the servient estate, to obstruct an easement, is not revocable after it is executed, and may operate as an abandonment to the extent of such license.[14] So the owner of the dominant estate may make such changes in the use and condition thereof as to renounce the easement;[15] and this may be relied on by the owner of the servient estate as an abandonment.[16] But a mere abuse of the right, such as using a way for a purpose not included in the right, is only a trespass, and the right remains.[17] But where the particular purpose for which an easement was granted no longer exists, the easement is at an end.[18] An instance of the extinguishment of an easement by operation of law is where a right of way to certain buildings is lost by the laying out and construction of a highway over the site of such buildings.[19] So if the servient and dominant estates become united in the same owner, the easement is extinguished by unity of title and possession, and cannot afterwards be claimed without a new grant.[20] But in order to operate as an extinguishment, the estates thus united must be respectively equal in duration, and not liable to be again disjoined by the act of the law.[21] If a person holds one estate in severalty, and only a fractional part of the other, the easement is not extinguished.[22]

1 Hancock v. Wentworth, 5 Met. 451; Taylor v. Hampton, 4 McCord, 96; 17 Am. Dec. 710; Corning v. Gould, 16 Wend. 541.

2 Taylor v. Hampton, 4 McCord, 96; 17 Am. Dec. 710; and see Tyler v. Hammond, 11 Pick. 220; Pearce v. McClenegban, 5 Rich. 178; Thomas v. Thomas, 2 Cromp. M. & R. 41.

3 Taylor v. Hampton, 4 McCord, 96; 17 Am. Dec. 710; and see Corning v. Gould, 16 Wend. 538; Partridge v. Gilbert, 15 N. Y. 601; Ecgina v. Chorley, 12 Q. B. 515; Liggins v. Inge, 7 Bing. 682.

4 Taylor v. Hampton, 4 McCord, 96; 17 Am. Dec. 710.

5 See Lawrence v. Obee, 3 Camp. 514; Moore v. Rawson, 3 Barn. &

C. 352; Crain v. Fox, 16 Barb. 184; Vogler v. Geiss, 51 Md. 407; Nicholas v. Chamberlain, Cro. Jac. 121.

6 See Cooper v. Barber, 3 Taunt. 99; Hazard v. Robinson, 3 Mason, 272; Arnold v. Cornman, 50 Pa. St. 361; Dyer v. Sanford, 9 Met. 395; Gawtry v. Leland, 31 N. J. Eq. 385.

7 Pope v. Devereux, 5 Gray, 409; Coleman's Appeal, 62 Pa. St. 274; Reg. v. Chorley, 12 Q. B. 515.

8 Dana v. Valentine, 5 Met. 14; Louisville R. R. v. Covington, 2 Bush, 532; Crossley v. Lightowler, Law R. 2 Ch. 478; Parkins v. Dunham, 3 Strob. 224; Stokoe v. Singers, 8 El. & B. 31. Compare Hayford v. Spokesfield, 100 Mass. 491; Jamaica Pond Aqueduct v. Chandler, 121 Mass. 3. An agreement made by a lessee for years to abandon an easement belonging to the estate does not bind the reversioner unless he is a party to it, or it is made with his knowledge and acquiescence: Glenn v. Davis, 35 Md. 208; 6 Am. Rep. 389.

9 Farrar v. Cooper, 34 Me. 400; White v. Crawford, 10 Mass. 183; Pillsbury v. Moore, 44 Me. 154; Wilder v. St. Paul, 12 Minn. 208; Jennison v. Walker, 11 Gray, 425; Regina v. Chorley, 12 Q. B. 515.

10 Arnold v. Stevens, 24 Pick. 106; Londendyck v. Anderson, 59 How. Pr. 1.

11 Jewett v. Jewett, 16 Barb. 150; Bannon v. Angier, 2 Allen, 128; Chandler v. Jamaica Pond Aqueduct, 125 Mass. 544; Pope v. O'Hara, 48 N. Y. 446; Nitzell v. Paschall, 3 Rawle, 76; Farrar v. Cooper, 34 Me. 400; Hall v. McCaughey, 51 Pa. St. 43.

12 Doe v. Butler, 3 Wend. 149; and see Warshauer v. Randall, 109 Mass. 586; Ward v. Ward, 7 Ex. 838; Bowen v. Team, 6 Rich. 305.

13 Dyer v. Sanford, 9 Met. 395.

14 Willis v. Harrison, 4 Mees. & W. 538; Hewlins v. Shippam, 5 Barn. & C. 221; Warshauer v. Randall, 109 Mass. 586; Pope v. Devereux, 5 Gray, 409.

15 Dyer v. Sanford, 9 Met. 395. Compare Leathers v. Furr, 62 Ga. 421.

16 Jones v. Tapling, 11 Com. B. N. S. 283; Garritt v. Sharp, 3 Ad. & E. 325; Hutchinson v. Copestake, 9 Com. B. N. S. 863. Compare Stackpole v. Curtis, 32 Me. 385; Casler v. Shipman, 35 N. Y. 533; Aynsley v. Glover, Law R. 18 Eq. 544; 10 Ch. App. 283; 12 Eng. 726.

17 Mendell v. Delano, 7 Met. 176. Compare Jones v. Tapling, 11 Com. B. N. S. 283.

18 Nat. etc. Co. v. Donald, 4 Hurl. & N. 8; Chase v. Sutton Manuf. Co. 4 Cush. 152.

19 Hancock v. Wentworth, 5 Met. 446. Compare Mussey v. Union Wharf, 41 Me. 34; Lide v. Hadley, 36 Ala. 627; Abbott v. Stewartstown, 47 N. H. 230; Arnold v. Cornman, 50 Pa. St. 361.

20 Coleman's Appeal, 62 Pa. St. 274; Ritger v. Parker, 8 Cush. 147; Plympton v. Converse, 42 Vt. 712; Atwater v. Bodfish, 11 Gray, 150; Warren v. Beake, 54 Me. 276.

21 Ritger v. Parker, 8 Cush. 147; Bradley Fish Co. v. Dudley, 37 Conn. 136; Ivimey v. Stocker, Law R. 1 Ch. 396.

22 Atlanta Mills v. Mason, 120 Mass. 244.

§ 148. Remedies for obstruction of.—The remedy for the obstruction of an easement may be either legal or equitable, according to the circumstances of the case.[1]

The legal remedy is a pecuniary recompense in damages for the injury sustained.[2] But there are many cases of injury not susceptible of being adequately compensated by damages at law, and courts of equity will interfere by injunction, either to restrain the continuance of the wrong,[3] or to prevent the commission of a threatened injury.[4] So the party whose easement is disturbed may himself enter the land and abate the obstruction;[5] and in so doing, he does not lose his right to recover by action the damages he may have sustained up to the time of such abatement.[6] But in abating the obstruction he must act in a reasonable manner,[7] so as not to cause unnecessary loss,[8] and if he goes beyond his right in this respect, he may be treated as a trespasser.[9]

1 See Parker v. Griswold, 17 Conn. 288; Munroe v. Stickney, 48 Me. 462; Clifford v. Hoare, Law R. 9 Com. P. 372; 9 Eng. R. 449; Aynsley v. Glover, Law R. 18 Eq. 544; 11 Eng. R. 521; Jackson v. New Castle, 33 Law J. N. S. 698; Bliss v. Kennedy, 43 Ill. 74; Burnham v. Kempton, 44 N. H. 79.

2 Chatfield v. Wilson, 27 Vt. 670; Gilmore v. Driscoll, 122 Mass. 199; 23 Am. Rep. 312; Sampson v. Hoddinott, 1 Com. B. N. S. 590; Baer v. Martin, 8 Blackf. 317.

3 Burwell v. Hobson, 12 Gratt. 322; Ackerman v. Horicon Co. 16 Wis. 154; Corning v. Troy Factory, 40 N. Y. 192; Merrifield v. Lombard, 13 Allen, 16; Wood v. Saunders, Law R. 10 Ch. 582; 14 Eng. R. 805.

4 Ingraham v. Dunnell, 5 Met. 118; Mott v. Schoolbred, Law R. 20 Eq. 22; 13 Eng. R. 582.

5 McCord v. High, 24 Iowa, 348; Adams v. Barney, 25 Vt. 225; Perry v. Fitzhowe, 8 Q. B. 757; Ballard v. Butler, 30 Me. 94.

6 White v. Chapin, 102 Mass. 138; Tate v. Parish, 7 Mon. B. 328.

7 Morrison v. Howe, 120 Mass. 571; Tuthill v. Scott, 43 Vt. 525; Roberts v. Rose, Law R. 1 Ex. 82; Amick v. Tharp, 13 Gratt. 567.

8 Burling v. Read, 11 Q. B. 904.

9 Gauley v. Looney, 14 Allen, 40; Heath v. Williams, 25 Me. 209; Wright v. Moore, 38 Ala. 599; Davies v. Williams, 16 Q. B. 546; Dyer v. Depui, 5 Whart. 584. Comparo Elliott v. Rhett, 5 Rich. 405.

CHAPTER XV.

USES AND TRUSTS.

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§ 149. Definition and origin of use.—Uses and trusts, or what are denominated "equitable estates," are such as have been derived from the rules and principles which prevail in courts of equity.[1] Originally, the common law admitted of no estates in lands which were not clothed with the legal seizin and possession.[2] But at an early period in England, a right to the rents and profits of lands whereof another person had the legal seizin and possession was introduced, and became well known by the name of a *use*.[3] A use is therefore defined to be "where the legal estate of lands is in A, in trust, that B shall take the profits, and that A will make and execute estates according to the direction of B."[4] It is said that

uses existed in the Roman law, under the name of *fidei commissa*, or trusts, and were introduced therefrom into England in the reign of Edward III., by the English ecclesiastics, in their attempts to evade the statutes of Mortmain.[5] When this evasion of law was suppressed by statute, uses were applied to save lands from the effects of attainders, and were afterwards applied to a variety of purposes in the business of civil life, and grew up into a refined and regular system.[6]

1 See Co. Litt. 272 *a*; 1 Spence Eq. Jur. 436; 2 Blackst. Com. 328; Burt. Real Prop. 114. The doctrine of courts of equity is that equitable estates are considered, to all intents and purposes, as legal estates: Cushing *v.* Blake, 30 N. J. Eq. 695.

2 1 Greenl. Cruise, 294.

3 1 Greenl. Cruise, 294; 2 Blackst. Com. 328.

4 4 Kent Com. 289. See Chudleigh's Case, 1 Rep. 121.

5 2 Blackst. Com. 328; 1 Spence Eq. Juris. 436; Chudleigh's Case, 1 Rep. 121.

6 See 1 Spence Eq. Jur. 441; 4 Kent Com. 290.

§ 150. Uses prior to statute of uses.—In order to create a use, it was necessary that the legal seizin and possession of the land should remain in one, called a feoffee to use; while the use or right to the rents and profits of the land was in another, called a *cestui que use*.[1] The feoffee to use, or trustee, was the real owner of the estate at law, and the *cestui que use* had only a confidence or trust, a precarious right, to enforce which no remedy existed at common law.[2] Many breaches of trust were committed, and as a remedy therefor the "writ of subpœna" was devised, by means of which a *cestui que use* might call the feoffee to use to account under oath in the court of chancery.[3] Subsequently this remedy in equity was allowed against the heir of the original feoffee, and also against alienees who had notice of the former use, although they had paid a valuable consideration.[4] But if a feoffee to uses enfeoffed a stranger of the land, for a valuable consideration, and without notice of the use, the use was destroyed, and the new feoffee could not be compelled to execute it.[5] On first assuming jurisdiction in cases of

uses, the court of chancery interfered no further than to compel payment of the rents and profits to the *cestui que use*;[6] but it was afterwards established as a rule, that the *cestui que use* had a right to call on the feoffee for a conveyance of the land to himself, or to such person as he should select, and also to compel him to defend the title to the land against any adverse claimant.[7] Hence, pernancy of the profits, execution of estates, and defense of the land were said to be the three incidents of a use.[8] In England all private persons whom the common law enabled to take lands by feoffment might be seized to a use.[9] But a corporation could not be so seized,[10] though it might take as a *cestui que use*.[11] All lands and hereditaments, incorporeal as well as corporeal, which were *in esse* at the time, might be conveyed to uses.[12] A valuable consideration paid by a feoffee, however small, raised a use in his favor;[13] and it was not necessary that it should be expressed in the deed.[14] But chancery would not enforce a use, unless it had been raised for a good or a valuable consideration.[15] Uses were devisable;[16] also descendible in the same manner as legal estates;[17] and were alienable by any species of deed or writing,[18] and none of those technical words which the law requires in the limitation of particular estates were deemed necessary.[19] Neither courtesy nor dower could be had in a use;[20] and not being an estate in the land, it was exempt from the burdens and incidents of tenure.[21] The feoffee to use, as owner of the land at law, performed the feudal services, his wife had dower, he had power to sell the lands, and he forfeited them for treason or felony.[22]

1 1 Greenl. Cruise, 294; Co. Litt. 271 *b*; 1 Spence Eq. Jur. 442.

2 Chudleigh's Case, 1 Rep. 122 *a*; Dalamere *v.* Barnard, Plow. 352; 4 Kent Com. 289; and see Arms *v.* Ashley, 4 Pick. 71.

3 1 Greenl. Cruise, 297; 2 Washb. Real Prop. 96.

4 1 Greenl. Cruise, 302; 2 Blackst. Com. 329; 1 Spence Eq. Jur. 445; and see Burgess *v.* Wheate, 1 Black. W. 156; Dunlap *v.* Stetson, 4 Mason, 349; Adair *v.* Shaw, 1 Schoales & L. 262.

5 Chudleigh's Case, 1 Rep. 122 *b*; 1 Greenl. Cruise, 302

6 1 Greenl. Cruise, 301.

7 Chudleigh's Case, 1 Rep. 121; Tud. Lead. Cas. 252.

8 2 Black. Com. 330; 1 Greenl. Cruise, 301.

9 1 Greenl. Cruise, 303.

10 Bac. Read. 58; 1 Greenl. Cruise, 304. In the United States, a corporate body may be seized to any use not foreign to the object of its creation: See Boone Corp. §§ 51, 52.

11 Tud. Lead. Cas. 254.

12 2 Black. Com. 331; Jones W. 127; Yelverton v. Yelverton, Cro. Eliz. 401.

13 See 1 Spence Eq. Jur. 451; 2 Black, 329; Barker v. Keat, 2 Mod. 249.

14 2 Black. Com. 329; and see Tippin v. Coson, 4 Mod. 380; Sprague v. Woods, 4 Watts & S. 192.

15 1 Greenl. Cruise, 305, 306; See Storer v. Batson, 8 Mass. 431, 441.

16 Co. Litt. 271 *b*; 2 Black. Com. 329.

17 1 Greenl. Cruise, 309; 1 Spence Eq. Jur. 455; 2 Rolle Abr. 780.

18 1 Greenl. Cruise, 307; see Claiborne v. Henderson, 3 Hen. & M. 354.

19 1 Greenl. Cruise, 308; and see Fisher v. Fields, 10 Johns. 506; Bryan v. Bradley, 16 Conn. 484.

20 2 Black. Com. 331; 4 Kent. Com. 293.

21 1 Greenl. Cruise, 306.

22 4 Kent Com. 292; 1 Greenl. Cruise, 301.

§ 151. Under statute of uses.—Uses, as regulated and settled by the court of chancery, in the course of time became so general and were perverted to such mischievous purposes as to be productive of very serious grievances.[1] As a remedy therefor successive statutes were enacted,[2] but means for evading them were speedily devised, and the evils complained of continued to exist.[3] At length parliament passed the statute 27 Hen. 8, c. 10 (A. D. 1535), entitled "An act concerning uses and wills," usually called the Statute of Uses;[4] which, by a sudden and strong effort of legislative power, converted equitable into legal estates.[5] This statute, after reciting the inconveniences inseparable from the equitable doctrine of uses, enacts that "when any person shall be seized of lands, etc., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seized or possessed of the land, etc., of and in the like estates as they have in

the use, trust, or confidence; and that the estate of the person so seized to uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition as they had before in the use." [6] It seems to have been the intention of the legislature entirely to abolish the practice of conveying to uses;[7] and the statute has so far answered this intention as to unite the legal seizin and possession of the land to the use immediately upon its creation,[8] thereby making the *cestui que use* complete owner of the lands, as well at law as in equity,[9] and subjecting them to the charges and incumbrances of the *cestui que use*.[10] The lands likewise ceased to be devisable by will.[11] The three circumstances necessary to the execution of a use under the statute are, first, a person seized to the use of some other person; second, a *cestui que use in esse;* third, a use *in esse*, in possession, remainder, or reversion.[12]

1 See 1 Greenl. Cruise, 310; Chudleigh's Case, 1 Rep. 122.

2 Stat. 2 Rich. 2, c. 23; 15 Rich. 2, c. 5; 1 Rich. 3, c. 1, and 50 Edw. 3. See 2 Washb. Real Prop. 108.

3 1 Greenl. Cruise, 313.

4 2 Blackst. Com. 332; 4 Kent Com. 294; 1 Greenl. Cruise, 313.

5 Burt. Real Prop. 127. See Wms. Real Prop. 133; Hopkins *v.* Hopkins, 1 Atk. 591; 1 Spence Eq. Jur. 494; Vander Volgen *v.* Yates, 3 Barb. Ch. 243.

6 2 Blackst. Com. 232, 233; 2 Washb. Real Prop. 110, 111.

7 Co. Litt. 271; 1 Greenl. Cruise, 316; Chudleigh's Case, 1 Rep. 124.

8 1 Greenl. Cruise, 317; and see Bryan *v.* Bradley, 16 Conn. 484; Johnson *v.* Johnson, 7 Allen, 197.

9 2 Blackst. Com. 333; Brent's Case, 2 Leon. 18; and see Bliss *v.* Smith, 1 Ala. N. S. 273.

10 2 Blackst. Com. 333; 1 Greenl. Cruise, 317; Brent's Case, 2 Leon. 18.

11 2 Blackst. Com. 333.

12 Chudleigh's Case, 1 Rep. 126; and see Chenery *v.* Stevens, 97 Mass. 86.

§ 152. Who may be seized to uses.—All persons, including *femes-covert* and infants, who were capable of being seized to uses before the statute,[1] may, under the statute, be seized to a use.[2] But the words of the statute, which are, "any person or persons," exclude aliens and corporations;[3] and it is said that a person uncertain is not within the statute.[4]

1 See § 150, *ante;* Chudleigh's Case, 1 Rep. 126 *a.*

2 1 Greenl. Cruise, 317. See Pimb's Case, Moore, 196.

3 1 Greenl. Cruise, 318; and see King *v.* Boys, Dyer, 283; Ferguson *v.* Franklin, 9 Munf. 305. In the United States, the word "persons," includes corporations: see Boone Corp. § 4; United States *v.* Amedy, 11 Wheat. 392.

4 2 Washb. Real Prop. 113.

§ 153. What property within statute.—The words of the statute comprehend every species of real property in possession, remainder, or reversion;[1] and therefore, not only corporeal hereditaments, but also incorporeal ones, as advowsons, rents, etc., may be conveyed to uses.[2] But in law every disposal supposes a precedent property, and therefore no person can convey a use in land of which he is not seized in possession when the conveyance is made.[3] The word "seized," in the statute, extends to every estate of freehold;[4] therefore a tenant in tail may be seized to a use.[5] So the statute will execute the use declared upon the seizin of a grantee for life;[6] but such use will determine, together with the legal estate transferred to it by the statute, upon the death of the tenant for life.[7]

1 See Greenl. Cruise, 314; Burt. Real Prop. 128.

2 1 Greenl. Cruise, 321; Yelverton *v.* Yelverton, Cro. Eliz. 401; Tud. Lead. Cas. 259; Franciscus *v.* Reigert, 4 Watts, 118.

3 Yelverton *v.* Yelverton, Cro. Eliz. 401. See Galliers *v.* Moss, 9 Barn. & C. 267; Gilbertson *v.* Richards, 4 Hurl. & N. 277.

4 1 Greenl. Cruise, 318; Crawley's Case, 2 And. 130.

5 1 Greenl. Cruise, 320.

6 1 Greenl. Cruise, 321; and see Norton *v.* Frecker, 1 Atk. 523.

7 Crawley's Case, Cro. Eliz. 721; Williams *v.* Jekyll, 2 Ves. 632.

§ 154. Must be a cestui que use in esse.—A use requires a *cestui que use in esse,* and if a use be limited to a person not *in esse,* or to a person uncertain, the statute can have no operation until the *cestui que use* comes into being, or is ascertained.[1] But in respect to those who may be *cestuis que use,* all persons who are capable of taking lands by any common law conveyance may also have a use limited to them, not even excluding corpora-

tions.[2] And a use raised by a husband to his wife will be executed by the statute.[3] In general, the *cestui que use* must be a different person from the one who is seized to the use;[4] and if the party seized to the use and the *cestui que use* be the same person, he never takes under the statute, unless there be a direct impossibility or impertinency for the use to take effect by the common law.[5] A *cestui que use* may take any estate known to the law, whether in fee-simple or fee-tail, term of life, or years, or otherwise, or in remainder or reversion.[6]

1 1 Greenl. Cruise, 322; 2 Blackst. Com. 334; Ashhurst *v.* Given, 5 Watts & S. 323; Ref. Dutch Church *v.* Veeder, 4 Wend. 494; Sewall *v.* Cargill, 15 Me. 414.

2 1 Greenl. Cruise, 322.

3 Bedell's Case, 7 Rep. 40; Co. Litt. 112 *a*; and see Martin *v.* Martin, 1 Me. 394; Thatcher *v.* Omans, 3 Pick. 521.

4 1 Greenl. Cruise, 323.

5 Sammes' Case, 13 Rep. 56; Jackson *v.* Myers, 3 Johns. 388; Jackson *v.* Cary, 16 Johns. 302; Jenkins *v.* Young, Cro. Car. 231.

6 1 Greenl. Cruise, 322.

§ 155. Must be a use in esse.—A use *in esse*, in possession, remainder, or reversion, is the third requisite to the execution of a use under the statute;[1] though it is immaterial whether this use be created by an express declaration, or whether it results or arises from an implication of law.[2] Upon the concurrence of these three circumstances—namely, a person seized to a use,[3] a *cestui que use in esse*,[4] and a use *in esse*—the use is said to be executed;[5] that is, the possession and legal estate in the land out of which the use is granted is immediately taken from the feoffee to uses, and vested in the *cestui que use*.[6] The seizin and possession thus transferred are not a mere title to enter upon the land, but an actual estate;[7] and consequently subject to escheat, courtesy, dower, and all the incidents to which a legal estate is liable.[8]

1 Chudleigh's Case, 1 Rep. 126 *a*.

2 Chudleigh's Case, 1 Rep. 126 *a*; 1 Greenl. Cruise, 326; Bryan *v.* Bradley, 16 Conn. 485.

3 See §§ 151, 152, *ante*.

4 § 154, *ante*.

5 Chudleigh's Case, 1 Rep. 126 *a*; Cro. Eliz. 46; Bryan *v.* Bradley, 16 Conn. 483.

6 Co. Litt. 266 *b*; 1 Greenl. Cruise, 327.

7 Chudleigh's Case, 1 Rep. 126 *a*; Barker *v.* Keate, 2 Mod. 249; Bliss *v.* Smith, 1 Ala. (N. S.) 273; Duvall *v.* Bibb, 3 Call, 362.

8 See Tud. Lead. Cas. 261; Sand. Uses, 119.

§ 156. Construction of statute.—It was the intention of the statute to restore the ancient common law which, in a manner, had become subverted by abusive and erroneous uses.[1] And in construing the statute, it was settled by the courts, that the same technical words of limitation necessary to create an estate in fee upon a conveyance at common law were equally necessary upon a conveyance to uses under the statute.[2] But, in other instances, a strict construction of the statute was insisted upon, and its intent thereby defeated.[3] Thus, it was decided by the judges that no use limited upon a use could be executed by the statute;[4] and therefore that a grant to A, to the use of B, to the use of C, vested the legal estate by force of the statute in B, while C retained the beneficial ownership, in the same manner as if the statute had never been passed.[5] In such cases the whole effect of the law was to change, not the estate, but the trustee;[6] and uses, under the name of trusts, were revived and perpetuated.[7]

1 Chudleigh's Case, 1 Rep. 129 *b*; and see § 151, *ante*.

2 Tud. Lead. Cas. 261; Abraham *v.* Twig, Cro. Eliz. 478; Makepeace *v.* Fletcher, Com. R. 457; Tapner *v.* Merlott, Willes, 180; Foster *v.* Romney, 11 East, 534; Varnhorn *v.* Harrison, 1 Dall. 137; 1 Am. Dec. 229.

3 1 Greenl. Cruise, 332; Corbet's Case, 1 Rep. 87 *b*.

4 Burt. Real Prop. 151; and see Wilson *v.* Cheshire, 1 McCord, 233; Vander Volgan *v.* Yates, 2 Barb. Ch. 250.

5 Burt. Real Prop. 151; Tyrrel's Case, Dyer, 155 *a*; and see Chaplin *v.* Chaplin, 3 P. Wms. 229; Hopkins *v.* Hopkins, 1 Atk. 591.

6 Hopkins *v.* Hopkins, 1 Atk. 591.

7 See Hopkins *v.* Hopkins, 1 Atk. 591; Vander Volgen *v.* Yates, 3 Barb. Ch. 243, 249; Ashhurst *v.* Given, 5 Watts & S. 327; 1 Spence Eq. Jur. 466.

§ 157. Statute of uses in United States.—The doctrine of the statute of uses (27 Hen. 3, c. 10) has be-

come incorporated into and is declared to be a part of the common law in several of the States;[1] and full effect is given to the provisions of the statute, excepting where they are superseded by express legislation.[2] But the statute seems never to have been in force in Ohio,[3] nor in Vermont;[4] and in New York uses and trusts were declared by the Revised Statutes to be abolished, except as therein authorized and modified.[5] In New Jersey, a statute enacted by the legislature accomplishes substantially the same thing as the English statute of uses.[6] In Virginia, a partial substitute for the English statute was provided by legislative enactment;[7] and so in some of the other States.[8] In respect to the operation of the statute of uses, it may be observed generally, that no transmutations of possession, by means of livery of seizin, was required, as at common law, in order to transfer a freehold estate in lands.[9] All that was necessary for the purpose was that one seized of land should convey the use thereof to another, when the statute executed the use, as it was termed,[10] by immediately transferring it into possession, and the legal title was thus passed to the *cestui que use* without any further ceremony.[11]

1 See Marshall *v.* Fisk, 6 Mass. 31; Johnson *v.* Johnson, 7 Allen, 197; French *v.* French, 3 N. H. 239; Report of the Judges, 3 Binn. 619; Barrett *v.* French, 1 Conn. 354; Adams *v.* Guerard, 29 Ga. 676; Matthews *v.* Ward, 10 Gill & J. 443; Society etc. *v.* Hartland, 2 Raine, 536.

2 Bryan *v.* Bradley, 16 Conn. 483.

3 Helfeinstine *v.* Garrard, 7 Ohio, 275.

4 Gorham *v.* Daniels, 23 Vt. 600; and see Sherman *v.* Dodge, 28 Vt. 26.

5 See 1 R. S. 727; Garfield *v.* Hatmaker, 15 N. Y. 477.

6 Den *v.* Crawford, 3 Halst. 107; and see Price *v.* Sisson, 13 N. J. Eq. 168; Cushing *v.* Blake, 30 N. J. Eq. 695.

7 See Duval *v.* Bibb, 3 Call, 362.

8 See Den *v.* Hanks, 5 Ired. 30; 1 Greenl. Cruise, 315, note.

9 Bryan *v.* Bradley, 16 Conn. 484.

10 See § 155, *ante*.

11 Bryan *v.* Bradley, 16 Conn. 483; Morgan *v.* Moore, 3 Gray, 323; Johnson *v.* Johnson, 7 Allen, 197.

§ 158. Extinguishment or suspension of use.— A use once executed by the statute cannot be extin-

guished or suspended, since by such execution the union of the seizin and use has created a legal estate.[1] But whenever the use limited by a deed expires, or cannot vest, or is to vest only upon a contingency, it reverts back to him who raised it.[2] And if the conveyance be made without any declaration of uses, or to such uses as the grantor shall thereafter appoint, or to the use of a third person on the occurrence of a specified event, in all such cases there is a use resulting back to the grantor.[3]

1 See § 155, *ante;* 2 Washb. Real Prop. 139; Jackson *v.* Dunbagh, 1 Johns. Cas. 91. A use *in esse* cannot be destroyed by the alienation of the person having seizin of the land: id.

2 Jackson *v.* Myers, 3 Johns. 388.

3 Clere's Case, 6 Coke, 17 *b*; 4 Kent Com. 299; Armstrong *v.* Wholesey, 2 Wils. 19; Woodliff *v.* Drury, Cro. Eliz. 439.

§ 159. Definition and origin of trusts.—It has already been stated that uses were not entirely abolished by the statute of uses, and that in many cases they still continued distinct from the legal estate, and were perpetuated under the name of trusts;[1] and therefore it is said that a trust is a use not executed by the operation of the said statute.[2] And a trust estate is described to be an equitable right to take the rents and profits of lands, whereof the legal estate is vested in some other person.[3] The person thus seized of the legal estate is called the trustee, and the person entitled to the profits is called the *cestui que trust*, or beneficiary.[4] Cases of trust are, for the most part, of equitable cognizance, and courts of equity are charged with the duty of seeing them fulfilled.[5] They are interests resting in equity and conscience, and the same general rules are applicable thereto in equity as were formerly applied to uses;[6] though it should be observed that trusts have been more nearly assimilated to legal estates than had ever been done in respect to uses.[7]

1 See § 156, *ante;* Johnson *v.* Fleet, 14 Wend. 180.

2 1 Greenl. Cruise, 351; 1 Spence Eq. Jur. 494. See Cushing *v.* Blake, 30 N. J. Eq. 698.

3 1 Greenl. Cruise, 351, 352; and see 2 Blackst. Com. 336; Story Eq.

Jur. § 964; Pooley v. Budd, 14 Beav. 34; 7 Eng. L. & Eq. 229; Talbott v. Todd, 5 Dana, 199; Sturges v. Knapp, 31 Vt. 1.

4 1 Greenl. Cruise, 352; Story Eq. Jur. § 964.

5 Broughton v. Langley, 2 Raym. Ld. 878; Newhall v. Wheeler, 7 Mass. 198; Shober v. Hauser, 4 Dev. & B. 96; Fisher v. Fields, 10 Johns. 494.

6 Fisher v. Fields, 10 Johns. 506; and see § 150, *ante*.

7 See Banks v. Sutton, 2 P. Wms. 713; Burgess v. Wheate, 1 Black. W. 180; Price v. Sisson, 13 N. J. Eq. 179.

§ 160. Creation of trusts.—One direct mode of creating a trust is by limiting a use upon a use.[1] Thus, a conveyance or devise to A, to the use of B, to the use of C, gives C a trust, the legal estate vesting in B.[2] C retains the beneficial ownership, and is entitled to the rents and profits of the land, and to the execution of such conveyances by B as he may choose to direct;[3] for it is evident that B, the first *cestui que use*, was never intended by the parties to have any beneficial interest in the land.[4] A second mode of creating a trust is where the person named as trustee has certain duties charged upon him in respect to the property, which require that the legal estate should be vested in him;[5] as, for instance, the duty to receive and pay over the rents and profits to the *cestui que trust*.[6] In such case the use is not executed, even though all the *cestuis que trust* are *sui juris*.[7] But a provision that the *cestui que trust* should *take* the rents and profits, or even that he should be permitted to receive them, would make an executed use, the legal estate becoming vested in the *cestui*.[8] A third mode in which a trust estate is created is where the estate granted to one to the use of another is less than a freehold, and cannot therefore be executed in the *cestui que use* by the statute of uses, the word "seized" used in the statute being applicable only to *freehold* estates.[9] Trusts created in the modes above described (by deed or by will) are known as express trusts.[10]

1 See 2 Blackst. Com. 336; Goodright v. Wells, 2 Doug. 774; Tyrrel's Case, Dyer, 155 *a*; Wilson v. Cheshire, 1 McCord, 233.

2 Franciscus v. Reigart, 4 Watts, 108; Thatcher v. Omans, 3 Pick.

338; Venables v. Morris, 7 Term Rep. 342; Doe v. Passingham, 6 Barn. & C. 305.

3 Whetstone v. Bury, 2 P. Wms. 146; Calvert v. Eden, 2 Har. & McH. 279; Doe v. Passingham, 6 Barn. & C. 305. See Nash v. Coates, 3 Barn. & Ald. 839.

4 2 Blackst. Com. 336. Under the operation of the New York statute (1 R. S. 727), a conveyance to A, in trust for B, in trust for C, at once vests the title in C, and would vest it in the *cestui que trust* last named, however numerous the trusts created: Johnson v. Fleet, 14 Wend. 180.

5 See Broughton v. Langley, 2 Raym. Ld. 873; Bagshaw v. Spencer, 1 Ves. Sr. 142; Doe v. Homfray, 6 Ad. & E. 206; Ward v. Amory, 1 Curt. 419; Lancaster v. Dolan, 1 Rawle, 231; Schley v. Lyon, 6 Ga. 530; Morton v. Barrett, 22 Me. 257; Barker v. Greenwood, 4 Mees. & W. 421.

6 Shankland's Appeal, 47 Pa. St. 113; and see Copp v. Norwich, 24 Conn. 28; Tilly v. Tilly, 2 Bland, 442; Norton v. Leonard, 12 Pick. 138; You v. Flinn, 34 Ala. 409.

7 Barrett's Appeal, 46 Pa. St. 392. See Cushing v. Blake, 30 N. J. Eq. 689.

8 Broughton v. Langley, 2 Raym. Ld. 873; Kinch v. Ward, 2 Sim. & St. 409. Trustees must not in general be allowed, by mere construction or implication, to take a greater estate than the nature of the trust demands: Doe v. Barthrop, 5 Taunt. 385; and see Doe v. Simpson, 3 East, 172; Laurens v. Jenny, 1 Spears, 356; Gould v. Lamb, 11 Met. 84; Upham v. Varney, 15 N. H. 462.

9 1 Greenl. Cruise, 368. Compare Tabb v. Baird, 3 Call, 482.

10 See Johnson v. Fleet, 14 Wend. 180; Cook v. Ellington, 6 Jones Eq. 371.

§ 161. Declaration of trust.—The English statute of frauds (29 Car. 2, c 3, § 7) requires all declarations or creations of trusts in real estate to be manifested and proved by some writing, signed by the party creating the trust, or by his last will in writing.[1] No particular form of declaration is, however, prescribed, nor is it necessary that it should be by deed; and a trust may be shown to exist by a letter, note, or memorandum in writing.[2] So intimations in a will, of hope or recommendation, will raise a trust.[3] And the time when the declaration of the trust is made may be either before or after the conveyance to the trustee.[4] Nor is it necessary that the declaration be made to the *cestui que trust*;[5] though made without his knowledge, it may be affirmed by him, and its execution enforced.[6] But evidence of the creation or transfer of a trust must all be in writing, so as not to necessitate a resort to parol evidence, even to connect different writings together.[7]

1 See 1 Greenl. Cruise, 388; 1 Spence Eq. Jur. 497; Smith *v.* Mathews, 3 DeGex, F. & J. 139; Walker *v.* Locke, 5 Cush. 90. In those States where this provision of the statute of frauds has not been adopted, a trust may be proved by parol: Foy *v.* Foy, 2 Hayw. (N. C.) 131; Miller *v.* Thatcher, 9 Tex. 482; 4 Kent Com. 305, n.

2 Fisher *v.* Fields, 10 Johns. 495; Steere *v.* Steere, 5 Johns. Ch. 1; Tracy *v.* Tracy, 3 Bradf. 57; Throop *v.* Hatch, 3 Abb. Pr. 23; Scituate *v.* Hanover, 16 Pick. 222; Norman *v.* Burnett, 25 Miss. 183; Ray *v.* Simmons, 11 R. I. 266; 23 Am. Rep. 447; Wright *v.* Douglass, 7 N. Y. 564; Kingsbury *v.* Burnside, 58 Ill. 310; 11 Am. Rep. 67. It is sufficient if the intention to create the trust can be fairly collected from the instrument: Morse *v.* Morse, 85 N. Y. 53.

3 Harper *v.* Phelps, 21 Conn. 257; Harrison *v.* Harrison, 2 Gratt. 1; Anderson *v.* Hammond, 2 Lea, 281; 31 Am. Rep. 612; McMahon *v.* Allen, 4 Smith, E. D. 519; Ingliss *v.* Trustees, etc. 3 Pet. 119; Cook *v.* Ellington, 6 Jones Eq. 371; Pennock's Estate, 20 Pa. St. 274. Compare Williams *v.* Worthington, 49 Md. 572; 33 Am. Rep. 286; Foose *v.* Whitmore, 82 N. Y. 405; In re Hutchinson, Law R. 8 Ch. Div. 540; Barrett *v.* Marsh, 126 Mass. 216; Hess *v.* Singler, 114 Mass. 56.

4 Jackson *v.* Moore, 6 Cowen, 706; Malin *v.* Malin, 1 Wend. 625; Reid *v.* Fitch, 11 Barb. 399; Barrell *v.* Joy, 16 Mass. 223.

5 Barrell *v.* Joy, 16 Mass. 221.

6 Weston *v.* Barker, 12 Johns. 276; Crocker *v.* Higgins, 7 Conn. 342; Woodbury *v.* Bowman, 14 Me. 154; 31 Am. Dec. 40; Bryant *v.* Russell, 23 Pick. 520; Neilson *v.* Blight, 1 Johns. Cas. 205.

7 Arms *v.* Ashley, 4 Pick. 71; Abeel *v.* Radcliff, 13 Johns. 297; Rutledge *v.* Smith, 1 McCord, 119. Compare Kingsbury *v.* Burnside, 58 Ill. 310; 11 Am. Rep. 67.

§ 162. Acceptance of trust.—To constitute one a trustee, he must in some way accept the trust.[1] But when he has accepted it, and has entered on its execution, he cannot afterwards, without the consent of the *cestui que trust*, or the direction of the court, surrender or discharge himself of the trust.[2] If the person named as trustee declines the trust, or refuses to act, the court, on proper application, will appoint a trustee, or otherwise provide for the execution of the trust;[3] for it is an established principle in equity, that a trust shall not fail for want of a trustee.[4]

1 Trask *v.* Donoghue, 1 Atk. 370; Bulkley *v.* DePeyster, 26 Wend. 21; Burritt *v.* Silliman, 13 N. Y. 93; Goss *v.* Singleton, 2 Head, 67; McCubbin *v.* Cromwell, 2 Gill & J. 157; Cooper *v.* McClure, 16 Ill. 435; Baldwin *v.* Porter, 12 Conn. 473.

2 Shepherd *v.* M'Evers, 4 Johns. Ch. 136; Gilchrist *v.* Stevenson, 9 Barb. 9; Doyle *v.* Blake, 2 Schoales & L. 245; Lowrey *v.* Fulton, 9 Sim. 123; Cruger *v.* Holliday, 11 Paige, 314.

3 Buchanan *v.* Hamilton, 5 Ves. 722; Wilson *v.* Towle, 36 N. H. 129; In re Ledwich, 6 Ired. Eq. 561; State Bank *v.* Smith, 6 Ala. 75; Howard *v.* Rhodes, 1 Keen, 581; Bainbridge *v.* Blair, 1 Beav. 495; Matter of

Mechanics' Bank, 2 Barb. 446; Gibbs v. Smith, 2 Rich. Eq. 131. A court of equity will not enforce a trust where its object is the propagation of atheism, infidelity, immorality, or hostility to the existing form of government: see Manners v. Phila. Library Co. 93 Pa. St. 165; 39 Am. Rep. 744.

4 Cloud v. Calhoun, 10 Rich. Eq. 358; White v. Hampton, 10 Iowa, 244; 13 Iowa, 261; Platt v. Vattier, 9 Peters, 405; Leggett v. Hunter, 19 N. Y. 445; 25 Barb. 81; Harris v. Rucker, 13 Mon. B. 564.

§ 163. Implied trusts.—Under the head of implied trusts may be included resulting trusts, and all such trusts as are not express.[1] They arise in all those cases where it would be contrary to the rules and principles of equity that he in whom the property becomes vested should hold it otherwise than as a trustee.[2] In other words, implied trusts are created by construction of law upon the acts or situation of the parties.[3] But the law never implies a trust where there is an express one.[4] And it is said that "a trust is never presumed or implied as intended by the parties, unless, taking all the circumstances together, that is the fair and reasonable interpretation of their acts and transactions."[5] Implied trusts are expressly excepted from the operation of the statute of frauds, and remain, as at common law, susceptible of proof by parol.[6] Thus, if A purchases land with his own money, but the deed is taken in the name of B, a trust results by operation of law to A,[7] and the fact may be proved by parol;[8] if part only of the consideration was paid by him, the trust results still, but *pro tanto* only.[9] To create a resulting trust by the payment of money, the proof must show that the money belonged to the *cestui que trust*, or had been advanced as a loan or a gift to him.[10] And the payment must be part of the transaction, and relate to the time when the purchase was made.[11] Any other valuable consideration will have the same effect to raise a resulting trust as the actual payment of money.[12] If land is conveyed without consideration of any kind, and no distinct trust is expressed, a trust results to the grantor.[13] But the smallest consideration is sufficient to prevent any resulting trust

in favor of the grantor.[14] If fraud is practiced in procuring a conveyance of land, the grantee in such conveyance will be considered in equity as a trustee for the grantor.[15] And as a general rule, any party in possession of land by fraud is in equity a trustee for the person beneficially interested.[16] So it is an established rule, that no one will be permitted to purchase property in contravention to his duty;[17] and if he does so, he will be treated in equity as a trustee for his principal or *cestui que trust*.[18] Such purchase by a trustee is, however, voidable only, and not void;[19] and it may be ratified by the *cestui que trust*, if done with the full knowledge of the facts.[20] Where a father purchases land, and takes a conveyance in the name of his minor child, the transaction is presumed to be an advancement;[21] but if it expressly appears to have been the intention of the father that it should not be an advancement, a trust will result to him.[22] Evidence of any kind, even parol evidence, is competent to rebut the presumption of a resulting trust, and to show a purchaser's intention that the estate should belong to the person in whose name the conveyance was taken;[23] provided it is not offered to contradict the terms of the instrument creating the estate.[24]

1 Johnson *v.* Fleet, 14 Wend. 181; and see Cook *v.* Fountain, 3 Swanst. 585; Lloyd *v.* Spillet, 2 Atk. 150; Thompson *v.* Peake, 7 Rich. 353; Brooks *v.* Dent, 1 Md. Ch. 523.

2 Dexter *v.* Stewart, 7 Johns. Ch. 52; Turner *v.* Peck, 1 Barb. Ch. 549; Phillips *v.* Crammond, 2 Wash. C. C. 441; Easterbrooks *v.* Tillinghast, 5 Gray, 17; Kisler *v.* Kisler, 2 Watts, 323; 27 Am. Dec. 308, 312.

3 Johnson *v.* Fleet, 14 Wend. 181; Dean *v.* Dean, 6 Conn. 285; Jenison *v.* Graves, 2 Blackf. 440; Hagthorp *v.* Hook, 3 Hayw. (N. C.) 57.

4 Dennison *v.* Goehring, 7 Pa. St. 175; and see Farrington *v.* Barr, 36 N. H. 86; Squire *v.* Harder, 1 Paige, 494; 19 Am. Dec. 446; Austice *v.* Brown, 6 Paige, 448.

5 Story Eq. Jur. § 1195; and see Cook *v.* Fountain, 3 Swanst. 585.

6 Jackson *v.* Sternbergh, 1 Johns. Cas. 153; Childs *v.* Jordon, 106 Mass. 321; Pritchard *v.* Brown, 4 N. H. 397; 17 Am. Dec. 431; Wallace *v.* Duffield, 2 Serg. & R. 221; 7 Am. Dec. 660; Foote *v.* Colvin, 3 Johns. 216; Foote *v.* Bryant, 47 N. Y. 544.

7 McLenan *v.* Sullivan, 13 Iowa, 525; Turner *v.* Eford, 5 Jones Eq. 106; Depeyster *v.* Gould, 3 N. J. Eq. 474; 29 Am. Dec. 723; Chadwick *v.* Felt, 35 Pa. St. 305; Harder *v.* Harder, 2 Sand. Ch. 17; and see Friedlander *v.* Johnson, 2 Woods, 675.

8 Boyd *v.* McLean, 1 Johns. Ch. 582; Brown *v.* Dwelley, 45 Me. 62; Kelly *v.* Johnson, 22 Mo. 249; Lindsey *v.* Plattner, 23 Miss. 576; Smith *v.* Strahan, 16 Tex. 314; Lounsbury *v.* Purdy, 18 N. Y. 515.

9 Botsford *v.* Burr, 2 Johns. Ch. 405; and compare Shoemaker *v.* Smith, 11 Humph. 81; Purdy *v.* Purdy, 3 Md. Ch. 546; Franklin *v.* McEntyre, 23 Ill. 91. But see *contra:* Jackson *v.* Bateman, 2 Wend. 570. There must be no uncertainty as to the proportion of the property to which the trust extends: Baker *v.* Vining, 30 Me. 127; Olcott *v.* Bynum, 17 Wall. 59.

10 Getman *v.* Getman, 1 Barb. Ch. 499; Oliver *v.* Dougherty, 3 Iowa, 371; Pegues *v.* Pegues, 5 Ired. Eq. 418; Osborne *v.* Endicott, 6 Cal. 149; and see City Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158.

11 Botsford *v.* Burr, 2 Johns. Ch. 409; Barnard *v.* Jewett, 97 Mass. 87; Olcott *v.* Bynum, 17 Wall. 44; Whiting *v.* Gould, 2 Wis. 552; Perry *v.* McHenry, 13 Ill. 227; Steere *v.* Steere, 6 Johns. Ch. 1; 9 Am. Dec. 256; Buck *v.* Swazey, 35 Me. 41; Kellum *v.* Smith, 33 Pa. St. 164; Lehman *v.* Lavis, 62 Ala. 129. The parol evidence of a payment by the real purchaser must be clear and undoubted: See 1 Greenl. Cruise, 372; Harper *v.* Phelps, 21 Conn. 257; Barron *v.* Barron, 24 Vt. 375; Groves *v.* Groves, 3 Younge & J. 163; Parker *v.* Snyder, 31 N. J. Eq. 169; Whitmore *v.* Learned, 70 Me. 276.

12 Williams *v.* Brown, 14 Ill. 200; Malin *v.* Malin, 1 Wend. 625.

13 1 Greenl. Cruise, 375; and see Farrington *v.* Barr, 36 N. H. 86; Vander Volgen *v.* Yates, 9 N. Y. 219. But compare Titcomb *v.* Morrill, 10 Allen, 15. The rule as stated in the text was confined to common-law conveyances, and does not apply to modern conveyances in common form, with recital of consideration, to the use of the grantee and his heirs: Gould *v.* Lynde, 114 Mass. 366.

14 Hagthorp *v.* Hook, 1 Gill & J. 297; Farrington *v.* Barr, 36 N. H. 86.

15 Brown *v.* Lynch, 1 Paige, 147; Trapnall *v.* Brown, 19 Ark. 48; Kellum *v.* Smith, 33 Pa. St. 158.

16 Brown *v.* Lynch, 1 Paige, 147; Gale *v.* Gale, 19 Barb. 251; Mich. Air Line Railw. Co. *v.* Mellen, 44 Mich. 321; Chesterfield *v.* Jansen, 2 Ves. 155. But see Farnham *v.* Clements, 51 Me. 426. A resulting trust cannot arise out of a fraud upon the government: Jackson *v.* Miller, 6 Wend. 228; 21 Am. Dec. 316.

17 Voorhees *v.* Presbyterian Church, 5 How. Pr. 65; 8 Barb. 142; and see Bennett *v.* Austin, 81 N. Y. 308; Reitz *v.* Reitz, 80 N. Y. 538.

18 Wells *v.* Robinson, 13 Cal. 133; Manning *v.* Hayden, 5 Sawy. 360; Hall *v.* Sprigg, 7 Mart. (La.) 243; 12 Am. Dec. 506; Sweet *v.* Jacocks, 6 Paige, 355; 31 Am. Dec. 252; Jamison *v.* Glascock, 29 Mo. 191; Baldwin *v.* Allison, 4 Minn. 25. Where a bailee wrongfully uses money deposited with him in part payment for land, a trust for the bailor attaches on the land: Bresnihan *v.* Sheehan, 125 Mass. 11; and see Mahauva Bank *v.* Barry, 125 Mass. 20.

19 Baldwin *v.* Allison, 4 Minn. 25; McNish *v.* Pope, 8 Rich. Eq. 112.

20 Hoffmann etc. Co. *v.* Cumberland etc. Co. 16 Md. 508.

21 Smith *v.* Strahan, 16 Tex. 314; You *v.* Flinn, 34 Ala. 409; Gee *v.* Gee, 32 Miss. 190; Sidmouth *v.* Sidmouth, 2 Beav. 447; Mumma *v.* Mumma, 2 Vern. 19; Livingston *v.* Livingston, 2 Johns. Ch. 540; Partridge *v.* Havens, 10 Paige, 618. If a husband purchases land with his own money, and causes the conveyance to be made to his wife, there is no presumption of a resulting trust, but *prima facie* this is a provision for the wife: Selbold *v.* Christman, 7 Mo. App. 254. See Stevens *v.* Stevens, 70 Me. 92; Green *v.* Irvine, 32 Gratt. 412; Cormerais *v.* Wesselhoeft, 114 Mass. 550.

22 Jackson *v.* Matsdorf, 11 Johns. 91; Prosens *v.* McIntyre, 5 Barb.

424; and see Douglass v. Brice, 4 Rich. Eq. 323; Cartwright v. Wise, 14 Ill. 417.

23 Finch v. Finch, 15 Ves. 43; Jackson v. Feller, 2 Wend. 465; Lloyd v. Lynch, 28 Pa. St. 419; Edwards v. Edwards, 33 Pa. St. 378.

24 Strimpfier; v. Roberts, 18 Pa. St. 283. A resulting trust can arise only at the inception of title, and in two ways, namely, through fraud in the acquisition of that title, or through payment of the purchase money: Cross's Appeal, Sup. Ct. (Pa.) 12 Rep. 251.

§ 164. Who may be trustees.—In general, all persons capable of confidence and of holding real estate may hold it as trustees.[1] In England, the sovereign may sustain the character of a trustee;[2] and in this country, a State may be a trustee.[3] A corporation may be a trustee, not only for its own members, but also for third persons;[4] and voluntary associations may even become trustees for certain purposes and objects.[5] Aliens may become trustees to the extent of their capacity to take and hold the legal title to the trust property, but no farther.[6] A married woman may be a trustee, where her own interests or that of her husband are not concerned;[7] but she cannot ordinarily be a trustee for her husband.[8]

1 Sand. Uses, 349; 2 Fonb. Eq. 139, n.; Pickering v. Shotwell, 10 Pa. St. 27; Potter v. Chapin, 6 Paige, 649.

2 3 Blackst. Com. 438; 1 Greenl. Cruise, 385; and see Reeve v. Att.-Gen. 2 Atk. 223; Casboard v. Ward, 6 Price, 44.

3 Pinson v. Ivey, 1 Yerg. 332; and see Mooers v. White, 6 Johns. Ch. 360; Borland v. Dean, 4 Mason, 174.

4 1 Greenl. Cruise, 385; Boone Corp. § 51.

5 See Shotwell v. Mott, 2 Sand. Ch. 46; Boone Corp. §§ 323, 340. Compare Owens v. M. E. Church, 14 N. Y. 380; Chapin v. First Universalist Soc. 8 Gray, 560.

6 See Jackson v. Lunn, 3 Johns. Ch. 109; Jackson v. Smith, 7 Wend. 367; DuHourmelin v. Sheldon, 4 Mylne & C. 525.

7 Co. Litt. 112 *a*; and see Lake v. DeLambert, 4 Ves. 595; Godolphin v. Godolphin, 1 Ves. 23; Springer v. Berry, 47 Me. 338.

8 Jencks v. Alexander, 11 Paige, 619; Alexander v. Warrance, 17 Mo. 228. Compare Smith v. Strahan, 16 Tex. 314; Rankin v. Harper, 23 Mo. 579.

§ 165. Who may be cestui que trust.—All persons capable of taking a conveyance of lands, including corporations, may acquire the equitable and beneficial interest in them, and become *cestuis que trust.*[1] Nor is it necessary that the *cestui que trust* should be named, or

even be *in esse*, at the time the trust is created in his favor.[2] The trust will take effect in him whenever he is ascertained, or comes into being.[3] Real estate purchased with partnership funds in equity belongs to the partnership, and the partners are deemed *cestuis que trust* thereof.[4]

1 Trotter *v.* Blacker, 6 Port. 269; Ashhurst *v.* Given, 5 Watts & S. 329; Amherst Acad. *v.* Cowls, 5 Pick. 427; Phillips Acad. *v.* King, 12 Mass. 546.

2 Frazier *v.* Frazier, 2 Hill Ch. 305. There can be no valid trust under a will unless there be a certain donee or beneficiary: Chili First Presby. Soc. *v.* Bowen, 21 Hun, 389.

3 2 Washb. Real Prop. 205; and see Bryant *v.* Russell, 23 Pick. 520; Miller *v.* Chittenden, 2 Iowa, 315.

4 Buchan *v.* Sumner, 2 Barb. Ch. 165; Coles *v.* Coles, 15 Johns. 159. And see Young *v.* Keighley, 15 Ves. 557; Wood *v.* Dummer, 3 Mason, 312.

§ 166. Estate of trustee.—It is an established general rule, that every trustee is presumed to take an estate as large as is necessary for the purpose of his trust.[1] But he must not, in general, be allowed, by mere construction or implication, to take a greater estate than the nature of the trust demands.[2] If the duties imposed on the trustees only require an estate *per autre vie* to be vested in them, their legal interest will be cut down to that extent.[3] On the other hand, the estate in the trustee may be enlarged by implication, if the purposes of the trust demand it;[4] as, for instance, on a conveyance to trustees without words of inheritance, a fee will be implied if necessary to effect the purposes of the trust.[5] If the trust is to mortgage lands, or to convey them in fee, the trustee will be understood to take a fee, since this quantity of estate will be required to perform the trusts;[6] but if a lesser estate be expressly limited, although it be entirely inadequate to carry the trusts into effect, a greater estate cannot be taken by implication.[7] Trustees empowered to receive rents and profits, and to apply them to the use of a person for life, take an estate which will enable them to maintain ejectment.[8]

1 Norton v. Norton, 2 Sand. 296; McCosker v. Brady, 1 Barb. Ch. 329; Ellis v. Fisher, 3 Sneed, 231; Doe v. Ellis, 4 Ad. & E. 582; Doe v. Needs, 2 Mees. & W. 129.

2 Doe v. Barthorp, 5 Taunt. 385; Doe v. Simpson, 3 East, 172.

3 Balgrave v. Balgrave, 4 Ex. 569; Doe v. Hicks, 7 Term Rep. 433; and see Henderson v. Williamson, 1 Keen, 41; Ackland v. Luttey, 9 Ad. & E. 879.

4 See North v. Philbrook, 34 Me. 537; Nelson v. Lagow, 12 How. (U. S.) 110; Williams v. First Soc. etc. 1 Ohio St. 478.

5 Fisher v. Fields, 10 Johns. 506; Chamberlain v. Thompson, 10 Conn. 243; Welch v. Allen, 21 Wend. 147; Zabriskie v. Morris etc. R. R. Co. 33 N. J. Eq. 22.

6 Bagshaw v. Spencer, 1 Ves. Sr. 142; 1 Greenl. Cruise, 360, n.

7 Warter v. Hutchinson, 1 Barn. & C. 747.

8 McLean v. McDonald, 2 Barb. 534; Goodtile v. Jones, 7 Term Rep. 47; and see Russell v. Lewis, 2 Pick. 510; Cox v. Walker, 26 Me. 504; Mordecia v. Parker, 3 Dev. 425; Canoy v. Troutman, 7 Ired. 155; Beach v. Beach, 14 Vt. 28; Lair v. Hunsicker, 28 Pa. St. 115; Zabriskie v. Morris etc. R. R. Co. 33 N. J. Eq. 22.

§ 167. Incidents to estate of trustee.—The legal estate is in the trustee so long as the execution of the trust requires it, and no longer, and then it vests in the person beneficially entitled.[1] At common law, he might convey or encumber the estate during his life, and dispose of it at his death, or, dying intestate, it would descend to his heirs.[2] But in equity, whoever acquires the legal estate from the trustee holds it himself as trustee for the benefit of the *cestui que trust*, and neither he nor his grantee can encumber it, or charge it with his own debts, or render it subject to the dower or courtesy of his or her wife or husband.[3] But a good title to real estate held in trust may be conveyed to a third person by a joint deed from the trustee and *cestui que trust*, if they are otherwise competent parties to a deed.[4] If the *cestui que trust* dies intestate, without heirs, the trustee retains the estate for his own use.[5] By the rule of the common law, if the king took lands by escheat, he held them discharged of the trust.[6] But it is now otherwise by statute, in England;[7] and it is thought that in this country no State would now hold escheated lands discharged of the trust, even in the absence of statutory provision on the subject.[8]

1 Nicoll v. Walworth, 4 Denio, 385; Bennett v. Gurlock, 10 Hun, 339; Anderson v. Mather, 44 N. Y. 257; Doe v. Ewart, 7 Ad. & E. 636.

2 Duffy v. Calvert, 6 Gill, 487; Boone v. Chiles, 10 Peters, 213.

3 2 Washb. Real Prop. 201, 205; and see McBrayer v. Carliker, 64 Ala. 50; Creveling v. Fritts, 34 N. J. Eq. 134; Heth v. Richmond R. R. Co. 4 Gratt. 482; Robison v. Codman, 1 Sum. 121; Hallett v. Collins, 10 How. 174; Castor v. Clarke, 3 Edw. Ch. 428; Den v. Troutman, 7 Ired. 155. As a general rule, a trustee cannot charge the trust estate by his executory contracts, unless authorized to do so by the terms of the instrument creating the trust: New v. Nicoll, 73 N. Y. 127; 29 Am. Rep. 111. Compare Randall v. Dusenbury, 63 N. Y. 645.

4 Parker v. Converse, 5 Gray, 336.

5 Burgess v. Wheate, 1 Black. W. 160; Matthews v. Ward, 10 Gill & J. 443.

6 4 Kent Com. 426; Pimb's Case, Moore, 196.

7 Stat. 4 and 5 Will. 4, c. 23.

8 See 1 Greenl. Cruise, 432, n.; 4 Kent Com. 425, 426; Matthews v. Ward, 10 Gill & J. 443.

§ 168. Union of legal and equitable estates.—Where the legal and equitable estates unite in one person, the equitable must merge in the legal, because a man cannot be trustee for himself.[1] But this rule must be understood with the restriction that it applies only where the legal and equitable estates are co-extensive and commensurate.[2]

1 Wade v. Paget, 1 Bro. C. C. 363; James v. Morey, 2 Cowen, 246; 14 Am. Dec. 475. See Collier v. Walters, Law R. 17 Eq. 252.

2 Brydges v. Brydges, 3 Ves. 126; and see Campbell v. Carter, 14 Ill. 286; Healey v. Alston, 25 Miss. 190; Reed v. Latson, 15 Barb. 9; Simonton v. Gray, 34 Me. 50. A legal and equitable estate are not merged by being united in the same person, if justice requires that they shall be kept separate: Earle v. Washburn, 7 Allen, 95.

§ 169. Incidents to trusts.—In equity, the *cestui que trust* is recognized as the real owner of the land.[1] And where he has the absolute interest in the trust, and the trustee is merely passive in respect to it,[2] he can compel the trustee to convey the legal estate either to himself or to any other person in fee-simple.[3] A trust estate is alienable and devisable,[4] and is subject to courtesy,[5] but not to dower.[6] All grants and assignments of trusts are required by the statute of frauds to be in writing, and signed by the party.[7] Land held in trust cannot be taken upon execution against the trustee,[8] nor can the trustee encumber the land, even for payment of the purchase-money.[9] But by the English statute of frauds (29 Car. 2, c. 3, § 10),[10] trusts are made liable to the debts

of the *cestui que trust*, and are declared to be assets in the hands of his heir.[11] And such is the law in those States where this statute has been adopted or re-enacted;[12] though it is held, that in order to bring the case within its provisions it must be a clear and simple trust, for the benefit of the judgment debtor only, and that a trust created partly for the benefit of the judgment debtor, and partly for the benefit of the trustee or a third person, is not affected thereby.[13] In some of the States, trust land is liable to process at law against the *cestui que trust*;[14] in others, it may be reached by process in equity.[15]

1 Murphy *v.* Grice. 2 Dev. & B. Eq. 199; Arnold *v.* Brown, 24 Pick. 89; and see Brown *v.* Wright, 4 Yerg. 57; Jamison *v.* Glascock, 29 Mo. 191; Burgess *v.* Wheate, 1 Black. W. 161; Watts *v.* Ball, 1 P. Wms. 108; Cholmondely *v.* Clinton, 2 Jacob & W. 148.

2 See Vaux *v.* Parke, 7 Watts & S. 19; Battle *v.* Petway, 5 Ired. 576.

3 Arrington *v.* Cherry, 10 Ga. 429; Stewart *v.* Chadwick, 8 Clarke, 463. See Morton *v.* Southgate, 28 Me. 41; Bass *v.* Scott, 2 Leigh. 359.

4 Elliott *v.* Armstrong, 2 Blackf. 198; Rogers *v.* Colt, 21 N. J. L. 704; Newhall *v.* Wheeler, 7 Mass. 189; Cushing *v.* Blake, 30 N. J. Eq. 695; Zabriskie *v.* Morris etc. R. R. Co. 33 N. J. Eq. 22.

5 Robison *v.* Codman, 1 Sum. 128; Cushing *v.* Blake, 30 N. J. Eq. 696; and see Bush's Appeal, 33 Pa. St. 88; Jarvis *v.* Prentice, 19 Conn. 272.

6 Co. Litt. 290 *b*; Ray *v.* Ring, 5 Barn. & Ald. 561; D'Arcy *v.* Blake, 2 Schoales & L. 283; Danforth *v.* Lowry, 3 Hayw. 68; Hamlin *v.* Hamlin, 19 Me. 141; Hawley *v.* James, 5 Paige, 452. But the law has been altered in this respect in England, by Stats. 3 and 4 Wm. 4, c. 105. So if immediately before his marriage a man secretly conveys his estate to a trustee for himself, in order to defeat his wife of dower, the conveyance will be deemed fraudulent and void: 1 Greenl. Cruise, 396; and see Jenny *v.* Jenny, 24 Vt. 324; Brower *v.* Connell, 11 Humph. 500. By statute, in New Jersey, a widow is entitled to dower in an equitable estate of her husband: Cushing *v.* Blake, 30 N. J. Eq. 696.

7 See Strimpfler *v.* Roberts, 18 Pa. St. 283; Sturtevant *v.* Sturtevant, 20 N. Y. 39; Hall *v.* Young, 37 N. H. 134; Peabody *v.* Tarbell, 2 Cush. 226.

8 Williams *v.* Fullerton, 20 Vt. 346.

9 Wilhelm *v.* Folmer, 6 Pa. St. 296; and see Robison *v.* Codman, 1 Sum. 121. The legal estate in the hands of the trustee is not affected by his bankruptcy or insolvency: Kip *v.* Bank of N. Y. 10 Johns. 63; Hynson *v.* Burton, 5 Ark. 492.

10 See also Stats. 1 and 2 Vict. c. 110, § 11.

11 See 1 Greenl. Cruise, 398; Wms. Real Prop. 140.

12 See Coults *v.* Walker, 2 Leigh, 280; Foote *v.* Colvin, 3 Johns. 216; Ontario Bank *v.* Root, 3 Paige, 481; Shute *v.* Harder, 1 Yerg. 1.

13 Harris *v.* Booker, 4 Bing. 96; Hall *v.* Greenhill, 4 Barn. & Ald. 684; Ontario Bank *v.* Root, 3 Paige, 481; Davis *v.* Garret, 3 Ired. 459.

14 See Pritchard *v.* Brown, 4 N. H. 415; 17 Am Dec. 431; Hutchins *v.* Heywood, 50 N. H. 491; Stanley *v.* Gilmer, 27 Ga. 589; M'Mehen *v.* Marman, 8 Gill. & J. 57; Bush's Appeal, 33 Pa. St. 85.

15 Gillispie *v.* Walker, 3 Mon. B. 505; Mathews *v.* Stevenson, 6 Pa. St. 496; Hopkins *v.* Carey, 23 Miss. 54; Russell *v.* Lewis, 2 Pick. 508.

§ 170. Effect of lapse of time on trust.—As between the trustee and *cestui que trust*, an express trust will not be barred by any lapse of time.[1] As long as there is a continuing and subsisting trust, acknowledged or acted upon by the parties, the Statute of Limitations does not apply;[2] but if the trustee denies the right of his *cestui que trust*, and the possession of the property becomes adverse, lapse of time, from that period, may constitute a bar in equity.[3] In other words, the statute begins to run from the time that the trust is repudiated or disclaimed by the trustee.[4] So, in cases of constructive trusts, the statute will begin to run against the *cestui que trust* from the time he has acquired, or with reasonable diligence might have acquired, the knowledge of the fact upon which the trust is founded.[5]

1 Wedderburn *v.* Wedderburn, 4 Mees. & Cr. 52; Boone *v.* Chiles, 10 Peters, 223; Foscue *v.* Foscue, 2 Ired. Eq. 321; Hayward *v.* Gunn, 82 Ill. 385.

2 Kane *v.* Bloodgood, 7 Johns. Ch. 120; 11 Am. Dec. 417; Love *v.* Watkins, 40 Cal. 547.

3 Kane *v.* Bloodgood, 7 Johns. Ch. 120; 11 Am. Dec. 417; Mason *v.* Mason, 33 Ga. 435; Bigelow *v.* Catlin, 50 Vt. 408; Wilmerding *v.* Russ, 33 Conn. 67; Platt *v.* Oliver, 2 McLean, 267; 3 How. 333; White *v.* Tucker, 52 Miss. 145.

4 Hoveden *v.* Lord Amresley, 2 Schoales & L. 307; Hearst *v.* Pujol, 44 Cal. 230; Poe *v.* Domic, 54 Mo. 119; Nease *v.* Capeheart, 8 W. Va. 95; Merriam *v.* Hassam, 14 Allen, 516.

5 Phalen *v.* Clark, 19 Conn. 421; Strimpfler *v.* Roberts, 18 Pa. St. 283; Starke *v.* Starke, 3 Rich. 447; Kane *v.* Bloodgood, 7 Johns. Ch. 120; 11 Am. Dec. 417. Compare Manning *v.* Hayden, 5 Sawy. 360.

§ 171. Compensation of trustees.—It is a principle universally recognized in equity, that a trustee shall not profit by his trust;[1] and formerly, a trustee was not entitled to charge compensation for his services.[2] Chancery looked upon trusts as honorary, and a burden upon the honor and conscience of the trustee, and not undertaken upon mercenary motives, though a fair and open bargain with the *cestui que trust*, for compensation, would be admissible.[3] But although the English rule is that

trustees are not entitled to any compensation for their services, yet the courts allow them a certain *per diem*, under the name of an idemnity.[4] The English rule has generally been rejected in this country, and provision has been made by statute for the compensation of trustees.[5] The rate of compensation is not, however, uniform in the different States, and it varies according to the circumstances of each case, the amount of the trust, and the nature and the value of the services.[6] In some of the States, trustees are held to be entitled to such compensation, as being within the equity of their statutes giving compensation to executors, etc.[7]

1 Robinson *v.* Pelt, 3 P. Wms. 132; Moore *v.* Frowde, 3 Mylne & C. 50; and see Boyd *v.* Hawkins, 2 Dev. Eq. 334.

2 Moore *v.* Frowde, 3 Mylne & C. 50.

3 Aycliffe *v.* Murray, 2 Atk. 58; Green *v.* Winter, 1 Johns. Ch. 37; Manning *v.* Manning, 1 Johns. Ch. 527.

4 See Ringgold *v.* Ringgold, 1 Har. & G. 11; 18 Am. Dec. 250, 268.

5 See Gibson's Case, 1 Bland Ch. 138; 17 Am. Dec. 257, 267, note.

6 Urann *v.* Coates, 117 Mass. 41; Matter of Schell, 53 N. Y. 263; Wagstaff *v.* Lowerre, 3 Abb. Pr. 414; Boyd *v.* Oglesby, 23 Gratt. 674.

7 Meacham *v.* Stearns, 9 Paige, 398; Boyd *v.* Hawkins, 2 Dev. Ch. 195; Granberry *v.* Granberry, 1 Wash. (Va.) 250; Prevost *v.* Gratz, 3 Wash. C. C. 434; Ogden *v.* Murray, 39 N. Y. 202; Re Moffat, 24 Hun, 326.

CHAPTER XVI.

REMAINDERS.

§ 172. Definition.
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§ 172. Definition.—There are two kinds of estates in expectancy, namely, estates in remainder, and estates in

reversion;[1] the former are created by the act of the parties, the latter by the act of law.[2] As defined by Coke, "a remainder is a remnant of an estate in lands or tenements, expectant on a particular estate, created together with the same at one time."[3] It follows that wherever the whole fee is first limited, there can be no remainder in the strict sense of the word.[4] A familiar instance of a remainder is where a man, seized of lands in fee-simple, grants them to A for twenty years, and after the determination of that term to B and his heirs forever; in which case, A is tenant for twenty years, with remainder to B in fee.[5] An estate for years is created or carved out of the fee, and given to A, and the residue or *remainder* of the estate is given to B. But both these interests are, in fact, only one estate—the present term for years and the remainder after, when added together, being equal only to one estate in fee.[6] The word "remainder" is not a term of art, and is not necessary to create a remainder; any other form of expression of equivalent meaning would be sufficient.[7]

1 2 Blackst. Com. 163; 1 Greenl. Cruise, 701.

2 4 Kent Com. 197: and see § 184, *post*.

3 Co. Litt. 143 *a*; 1 Greenl. Cruise, 702. Other definitions: see 4 Kent Com. 197; 2 Wash. Real Prop. 222; 2 Blackst. Com. 163. See also Sayward *v.* Sayward, 7 Me. 210; 22 Am. Dec. 191; Booth *v.* Terrell, 16 Ga. 20. The New York Revised Statutes define a remainder to be "an estate limited to commence in possession at a future day, on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time": 1 Rev. Stat. 723, §§ 10, 11; and see Leslie *v.* Marshall, 31 Barb. 564; Foley *v.* Foley, 17 Hun, 237; Sullivan *v.* Sullivan, 66 N. Y. 37.

4 Sayward *v.* Sayward, 7 Me. 210; 22 Am. Dec. 191; and see Burbank *v.* Whitney, 24 Pick. 146; Jackson *v.* Delancy, 13 Johns. 537; Jackson *v.* Robins, 16 Johns. 589.

5 2 Blackst. Com. 163; 1 Greenl. Cruise, 702. There may be any number of remainders over, one after the other, as in the case of a grant to A for years, remainder to B for life, remainder to C in tail, remainder to D in fee: 4 Kent Com. 198; Wms. Real Prop. 208.

6 2 Blackst. Com. 164; Wymple *v.* Fonda, 2 Johns. 288.

7 1 Greenl. Cruise, 703; Bac. Abr. Tit. Rem. B.

§ 173. Vested or contingent.—Remainders are either vested or contingent.[1] A remainder is vested,

when there is some person *in esse*, known and ascertained, who would have an immediate right to take and enjoy the estate upon the ceasing of the intermediate or precedent estate.[2] Thus, if A be tenant for years, remainder to B in fee, B's remainder is vested, which nothing can defeat or set aside.[3] So there may be successive remainders, all of which shall be vested; as, if the land be limited to A for life, remainder to B in tail, remainder to C in fee, all these remainders are vested.[4] The person entitled to a vested remainder has an estate *in præsenti*, though it is only to take effect in possession *in futuro*;[5] and such an estate is in general subject to the same dispositions as an estate in possession.[6] A remainder is contingent when it is limited to take effect on an event which may never happen, or which may not happen till after the preceding particular estate ends, or is limited to a person not *in esse* or not ascertained.[7] A present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.[8] In other words, in the former the enjoyment is uncertain, in the latter the right to that enjoyment is uncertain.[9] As a general rule, when the question is doubtful, the law favors that construction which holds a remainder vested, rather than that which considers it contingent.[10]

1 2 Blackst. Com. 168; Foley *v.* Foley, 17 Hun, 237.

2 Williamson *v.* Field, 2 Sand. Ch. 533, 552; Moore *v.* Littel, 41 N. Y. 72; Leslie *v.* Marshall, 31 Barb. 564; Croxall *v.* Shererd, 5 Wall. 268; 4 Kent Com. 202.

3 2 Blackst. Com. 169; 1 Greenl. Cruise, 703, 704; and see Hawley *v.* James, 4 Paige, 317, 466; Carter *v.* Hunt, 40 Barb. 85; Moore *v.* Littel, 41 N. Y. 66; Green *v.* Hewitt, 97 Ill. 113; 37 Am. Rep. 102.

4 1 Greenl. Cruise, 704; 1 Wash. Real Prop. 222. See Howell *v.* Mills, 7 Lans. 193; 56 N. Y. 226.

5 1 Greenl. Cruise, 704; Pearce *v.* Savage, 45 Me. 101; and see Marshall *v.* King, 24 Miss. 90. One is "seized" of an estate in remainder when the estate is vested: Jenkins *v.* Fahey, 73 N. Y. 363, 364.

6 Jackson *v.* Sublett, 10 Mon. B. 467; Glidden *v.* Blodgett, 38 N. H. 74; Kelly *v.* Morgan, 3 Yerg. 438; Lawrence *v.* Bayard, 7 Paige, 70;

Den v. Hillman, 7 N. J. L. 180; 1 N. Y. Rev. Stat. 723; Foley v. Foley, 17 Hun, 237; and see Moore v. Littel, 41 N. Y. 66; Parker v. Converse, 5 Gray, 336.

7 Williamson v. Field, 2 Sand. Ch. 552; Leslie v. Marshall, 31 Barb. 564. See 2 Blackst. Com. 169; 4 Kent Com. 205; Brown v. Lawrence, 3 Cush. 387; Moore v. Lyons, 25 Wend. 144; Thomson v. Ludington, 104 Mass. 193; Price v. Hall, Law R. 5 Eq. 399; Smith v. Rice, 130 Mass. 441.

8 1 Greenl. Cruise, 712; Howell v. Mills, 7 Lans. 196; Williamson v. Field, 2 Sand. Ch. 553; Brown v. Lawrence, 3 Cush. 397.

9 Williamson v. Field, 2 Sand. Ch. 553.

10 Olney v. Hull, 21 Pick. 313; Brown v. Lawrence, 3 Cush. 397; Fay v. Sylvester, 2 Gray, 171; Womrath v. McCormick, 51 Pa. St. 504; Moore v. Lyons, 25 Wend. 119; Wolfe v. Van Nostrand, 2 N. Y. 436; Doe v. Prigg, 8 Barn. & C. 231; Doe v. Perryn, 3 Term Rep. 434; Gardiner v. Guild, 106 Mass. 28; Kane v. Astor, 5 Sand. 467.

§ 174. Different kinds of contingent remainders.—A well-known classification of contingent remainders is that made by Mr. Fearne, who reduces them to four kinds:[1] *first*, where the remainder depends entirely on a contingent determination of the particular estate itself;[2] *second*, where some uncertain event, unconnected with and collateral to the determination of the particular estate, is by the nature of the limitation to precede the remainder;[3] *third*, where the remainder is limited to take effect upon an event which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate;[4] *fourth*, where it is limited to a person not ascertained, or not in being at the time when such limitation is made.[5] A more comprehensive and less complex division of the subject into two classes is made by Sir William Blackstone; namely, remainders limited to take effect to a dubious and uncertain person, or upon a dubious and uncertain event.[6] An instance of the first class is where a remainder is limited to the first son of B, who has no son then born; this is a contingent remainder, for it is uncertain whether B will have a son or not.[7] So if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent because it is uncertain which of them will be the survivor.[8] An instance illustrating the second class is where land is given to A for life, and in

case B survives him, then with remainder to B in fee; here B is a person certain, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A.[9] It was likewise declared by Lord Ch. J. Willes, whose classification Blackstone followed,[10] that there were but two sorts of contingent remainders: (1) where the person to whom the remainder was limited was not *in esse;* (2) where the commencement of the remainder depended on some matter collateral to the determination of the particular estate.[11] And as an instance of the latter, the case is put of a limitation to A for life, remainder to B after the death of C, or when D returns from Rome.[12] This class embraces the first three species of contingent remainders above given in the classification of Mr. Fearne.[13] Under the New York Revised Statutes, remainders are contingent whilst the person to whom or the event upon which they are limited to take effect remains uncertain.[14]

1 Fearne Cont. Rem. 5; and see 1 Greenl. Cruise, 704, *et seq.*; 4 Kent Com. 207; 2 Wash. Real Prop. 238; Leslie *v.* Marshall, 31 Barb. 566.

2 See Large's Case, 3 Leon. 182; Boraston's Case, 3 Rep. 19; 1 Greenl. Cruise, 705, 706; Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475.

3 See Co. Litt. 378 *a*; Doe *v.* Scudamore, 2 Bos. & P. 289; 1 Greenl. Cruise, 707; Matter of Ryder, 11 Paige, 185.

4 Boraston's Case, 3 Rep. 20 *a*.

5 See 1 Greenl. Cruise. 707; 4 Kent Com. 207; Richardson *v.* Wheatland, 7 Mct. 169; Hunt *v.* Hall, 37 Me. 363.

6 2 Blackst. Com. 169; and see Throop *v.* Williams, 5 Conn. 100.

7 2 Blackst. Com. 169.

8 Boraston's Case, 3 Rep. 19; Cro. Car. 102; and see Olney *v.* Hull, 21 Pick. 311; Sisson *v.* Seabury, 1 Sum. (C. C.) 235; Smith *v.* Rice, 130 Mass. 441.

9 2 Blackst. Com. 170; and see Bamforth *v.* Bamforth, 123 Mass. 282.

10 See 1 Greenl. Cruise, 706 *n*.

11 Parkhurst *v.* Smith, Willes, 338; 3 Atk. 139; 1 Greenl. Cruise, 715.

12 Parkhurst *v.* Smith, Willes, 338; 3 Atk. 139; 4 Kent Com. 208 *n*.

13 See 4 Kent Com. 208 *n*.

14 1 Rev. Stat. 123, § 13; and see Leslie *v.* Marshall, 31 Barb. 564.

§ 175. Event on which contingent remainder vests.—The event on which a contingent remainder may

be limited must be a legal one;[1] and therefore it was held that a limitation of a remainder to a bastard not *in esse* was void.[2] So the event must be within a common possibility, such as the death of a person, or death without issue, or coverture and the like;[3] and if it extend beyond such a possibility, a limitation thereon in the way of remainder would be void at common law.[4] Thus, an estate made to A for life, remainder to the heirs of B, is good; for, by common possibility, B may die before A, and the remainder then immediately vests in his heir, who will be entitled to the land on the death of A.[5] But a remainder to the right heirs of B, when there is no such person as B *in esse*, would be void, as being too remote.[6] In the third place, the event on which a remainder is limited must not operate so as to abridge, defeat, or determine the particular estate.[7] This rule is founded on the common-law maxim, that no one shall take advantage of a condition but the party from whom the condition moves; that is, the grantor and his heirs.[8]

1 Cholmley's Case, 2 Rep. 51 *b*

2 Blodwell *v.* Edwards, Cro. Eliz. 509. Compare Earle *v.* Wilson, 17 Ves. 531; Arnold *v.* Preston, 18 Ves. 288; Bayley *v.* Snelham, 1 Sim. & St. 81.

3 Cholmley's Case, 2 Rep. 51 *b*; Mayor etc. *v.* Alford, Cro. Car. 576; and see Cole *v.* Sewell, 2 H. L. Cas. 186; 4 Dru. & Walsh, 27; Dennett *v.* Dennett, 40 N. H. 503; Brudenell *v.* Elwes, 1 East, 452.

4 Hay *v.* Coventry, 3 Term Rep. 86. Otherwise under the New York statute: 1 R. S. 724, § 26.

5 Cholmley's Case, 2 Rep. 51 *b*; 2 Blackst. Com. 169, 170.

6 2 Blackst. Com. 170; 1 Greenl. Cruise, 734; and see Jackson *v.* Brown, 13 Wend. 437.

7 Sayer *v.* Hardy, Cro. Eliz. 414; 1 Greenl. Cruise, 737. In New York, a remainder limited upon a contingency which may operate to abridge or defeat the precedent estate is construed as a conditional limitation, and is given the same effect as such a limitation would have at law: 1 Rev. Stat. 725, § 27.

8 1 Greenl. Cruise, 737, 738; and see Parker *v.* Nichols, 7 Pick. 111; Proprietors etc. *v.* Grant, 3 Gray, 149.

§ 176. What estate will sustain contingent remainder.—It is a general rule at common law, that a freehold contingent remainder cannot be limited on an estate for years,[1] or any other particular estate less than

a freehold.[2] The reason of the rule is, that in the case of a valid contingent remainder, the freehold passes out of the grantor at the time when the remainder is created, and must vest in the particular tenant.[3] Unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.[4] It is not, however, necessary that such preceding estate continue in the actual seizin of its rightful tenant;[5] it is sufficient if there subsists a right of entry at the time the remainder should vest.[6] A contingent remainder for years does not require a preceding freehold to support it, since no seizin passes out of the grantor when he creates it.[7] And where the legal estate is in trustees, there is no necessity for any preceding particular estate of freehold to support contingent remainders, because the legal estate in the general trustees will be sufficient for that purpose.[8] The particular estate must be created by one and the same deed or instrument which creates the remainder;[9] and therefore, an estate for life given by one deed will not support a remainder given by another.[10] But a particular estate may be created by a will, and the remainder by a codicil, and *vice versa*.[11]

1 Goodright *v.* Cornish, 1 Salk. 226. Compare Elle *v.* Osborne, 2 Vern. 754; Butler *v.* Butler, 3 Barb. Ch. 304.

2 2 Blackst. Com. 171; 1 Greenl. Cruise, 745.

3 Burt. Real Prop. 33.

4 2 Blackst. Com. 171; Fearne Cont. Rem. 281; 1 Greenl. Cruise, 745.

5 1 Greenl. Cruise, 749.

6 1 Greenl. Cruise, 749; and see Thompson *v.* Leach, 12 Mod. 174; Davies *v.* Bush, 1 McClel. & Y. 58, 88.

7 Fearne Cont. Rem. 285; 1 Greenl. Cruise, 748. See Corbet *v.* Stone, Raym. T. 140.

8 Hopkins *v.* Hopkins, 1 Ves. Sr. 268; 1 Atk. 581; Davies *v.* Bush, 1 McClel. & Y. 82; Gale *v.* Gale, 2 Cox, 136.

9 1 Greenl. Cruise, 750; Co. Litt. 49 *a*.

10 Moore *v.* Parker, Raym. Ld. 37; 4 Mod. 316; 4 Kent Com. 212.

11 Hayes *v.* Foorde, 2 Black. W. 698; 1 Greenl. Cruise, 750 *n*.

§ 177. At what time remainder must vest.—It is the general rule that every remainder must vest either

during the continuance of the particular estate, or at the very instant of its determination.[1] And if a lease be made to A for life, and after the death of A, and one day after, the land to remain to B for life, this remainder to B is void, because it cannot take effect immediately upon the determination of the preceding estate.[2] In consequence of a strict construction of the rule, it was formerly held that where an estate was limited to A for life, remainder to his first and other sons in tail, a posthumous son of A could not take.[3] But this judgment was reversed by the House of Lords,[4] and the rule as now settled in England and in this country is, that an infant *en ventre sa mere* is deemed to be *in esse* for the purpose of taking a remainder,[5] or any other estate or interest which is for his benefit, whether by descent, by devise, or under the statute of distributions.[6] A contingent remainder may, however, take effect in some and not in all the persons to whom it was limited, by reason of some not being *in esse* before the determination of the particular estate;[7] but this rule seems to be confined to limitations at common law, and is not applicable to devises and uses.[8]

1 Plow. 25; Archer's Case, 1 Coke, 66; Doe v. Morgan, 3 Term Rep. 763; Purefoy v. Rogers, 3 Lev. 39; 2 Saund. 388.

2 1 Greenl. Cruise, 754.

3 2 Blackst. Com. 169; 1 Greenl. Cruise, 756.

4 Reeve v. Long, 1 Salk. 227.

5 Stats. 10 and 11 Wm. 3, c. 16. Under this statute, a posthumous child is entitled to the intermediate profits of the lands settled, as well as to the lands themselves: see Basset v. Basset, 3 Atk. 203.

6 4 Kent Com. 249; Thellusson v. Woodford, 4 Ves. 321; 11 Ves. 133; Marsellis v. Thalhimer, 2 Paige, 35; Stedfast v. Nicoll, 3 Johns. Cas. 18; Swift v. Duffield, 5 Serg. & R. 38; Burke v. Wilder, 1 McCord Ch. 551.

7 1 Greenl. Cruise, 762; Griffith v. Pownal, 13 Sim. 393; Wager v. Wager, 1 Serg. & R. 374.

8 Doe v. Perryn, 3 Term Rep. 484; Doe v. Provost, 4 Johns. 61.

§ 178. How defeated.—Since a legal remainder must vest either during the existence of the particular estate, or at the instant of its determination,[1] it follows that every such determination of the preceding estate, before

the contingency happens, as leaves no right of entry must effectually destroy the remainder also.[2] Thus, in England, where there is a tenant for life, with a contingent remainder expectant on his estate, if he makes a feoffment, or levies a fine, or suffers a recovery,[3] or surrenders his life estate,[4] it will destroy the remainder.[5] But a bargain and sale, or lease and release, by the tenant for life will not destroy the contingent remainders thereon, because these conveyances only transfer what the person seized of the land may lawfully convey, and do not divest any estate.[6] Any alteration in the *quantity* of the particular estate before the remainder vests will destroy it, though it seems to be otherwise as to an alteration in its *quality* only.[7] A merger of the particular estate may in some cases be effectual to destroy a contingent remainder.[8] A person who has merely a trust estate cannot, by any mode of conveyance, destroy a contingent remainder expectant on his estate.[9] The legal estate being in his trustees, there remains a right of entry in them which will support the remainders.[10]

1 See § 177, *ante*.

2 Doe *v.* Martin, 4 Term Rep. 39; Purefoy *v.* Rogers, 4 Mod. 284; 2 Saund. 306.

3 Chudleigh's Case, 1 Coke, 137 *b*; Archer's Case, 1 Coke, 66. See Blosse *v.* Clamorris, 3 Bligh, 62; Doe *v.* Howell, 10 Barn. & C. 191; Abbott *v.* Jenkins, 10 Serg. & R. 296.

4 Thompson *v.* Leach, 2 Salk. 427.

5 2 Blackst. Com. 171; 1 Greenl. Cruise, 776.

6 Smith *v.* Clyfford, 1 Term Rep. 744; 3 Mod. 151; and see Dennett *v.* Dennett, 40 N. H. 505.

7 Harrison *v.* Belsey, Raym. T. 413; 4 Kent Com. 253; 1 Greenl. Cruise, 778.

8 Purefoy *v.* Rogers, 2 Saund. 386; 2 Lev. 39; Crump *v.* Benson, 7 Taunt. 362; Kent *v.* Harpool, 1 Vent. 306.

9 1 Greenl. Cruise, 777.

10 1 Greenl. Cruise, 777; Davies *v.* Bush, 1 McClel. & Y. 58.

§ 179. Cross remainders.—Cross remainders arise where lands are given, in undivided shares, to two or more persons by the way of particular estates, by such limitations that upon the determination of the particular

estates in any of those shares, they remain over to the other grantees or donees named, and the remainder-man or reversioner is not let in till the determination of all the particular estates.[1] No technical words are necessary to create such remainders,[2] and they may be limited either by deed or by will;[3] but they cannot be raised in a deed, as in a will, by implication.[4] Where cross remainders are to be raised between two persons, the favorable presumption is in support of them;[5] but where between more than two, the presumption is against them.[6] But the presumption may in either case be rebutted by circumstances of plain, manifest intention.[7]

1 Co. Litt. 185 *b*; 1 Greenl. Cruise, 674; 2 Washb. Real Prop. 233; 4 Kent Com. 201.

2 Doe *v.* Wainewright, 5 Term Rep. 427; and see Edwards *v.* Alliston, 4 Russ. 78; Meyrick *v.* Whishaw, 2 Barn. & Ald. 810.

3 Cook *v.* Gerrard, 1 Wms. Saund. 186 *a*.

4 Cole *v.* Levingston, 1 Vent. 224; Doe *v.* Dorvell, 5 Term Rep. 521; Doe *v.* Worsley, 1 East, 416; Edwards *v.* Alliston, 4 Russ. 78; Baldrick *v.* White, 2 Ball. 442.

5 Atherton *v.* Pye, 4 Term Rep. 710; Phipard *v.* Mansfield, Cowp. 800.

6 Atherton *v.* Pye, 4 Term Rep. 710.

7 Marryatt *v.* Townly, 1 Ves. 102; Wright *v.* Englefield, Amb. 468; Cowp. 31; Atherton *v.* Pye, 4 Term Rep. 710.

§ 180. Rule in Shelley's Case.—It has been an established rule from a very early period in the history of the English law, "that when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs, in fee or in tail, that always in such cases the 'heirs of the body' are words of limitation of the estate, and not words of purchase."[1] This is known as the rule in Shelley's Case,[2] the substance of which, as expounded by the modern decisions, is, that where lands are granted or given by devise or otherwise to one for life, and afterwards to his heirs, or the heirs of his body, these latter words are to be taken as words of limitation and not of purchase;[3] and consequently, the

first taker has an estate in fee-simple or fee-tail, unless it clearly and unequivocally appears that the words are used merely as *descriptio personarum*.[4] The rule constitutes a part of the common law of every State where it has not been repealed by statute, and the following, among similar expressions, have been held to bring the particular case within the rule:[5] to one "in trust and for the use of his heirs at law";[6] to one "to be for his use during his life, and then to fall to his heirs";[7] to one "during his natural life, and then to his lawful heirs";[8] to one "during her life," and then "to her eldest male heir";[9] to M. "for and during his natural life, and from and after his decease to his lawful issue";[10] to C. "during her lifetime, and after her death to descend to the heirs of her body."[11] In many of the States, the rule has been wholly abrogated by statute;[12] in others, only in cases of wills;[13] and under statutes abolishing estates tail, the operation of the rule is arrested so far as such estates are concerned,[14] although, in the absence of such statutes, it might have been applied.[15] In Vermont, the rule is regarded as one merely of construction and intention.[16]

1 Shelley's Case, 1 Rep. 94, 104; and see 1 Greenl. Cruise, 682; 4 Kent Com. 214; Polk *v.* Faris, 9 Yerg. 209; 30 Am. Dec. 400; Cooper *v.* Kynock, Law R. 7 Ch. 398.

2 Wms. Real Prop. 209; 4 Kent Com. 214; Findley *v.* Riddle, 3 Binn. 139; 5 Am. Dec. 355, 367 *n*; Lyles *v.* Digges, 6 Har. & J. 364; 14 Am. Dec. 281.

3 See Doe *v.* Harvey, 4 Barn. & C. 610; Measure *v.* Gee, 5 Barn. & Ald. 910; Dot *v.* Cunnington, 1 Bay, 453; 1 Am. Dec. 624; Smith *v.* Chapman, 1 Hen. & M. 240; Simpers *v.* Simpers, 15 Md. 160; Brant *v.* Gelston, 2 Johns. Cas. 384; Polk *v.* Faris, 9 Yerg. 209; 30 Am. Dec. 400; Baker *v.* Scott, 62 Ill. 86; Yarnall's Appeal, 70 Pa. St. 340; Haldeman *v.* Haldeman, 40 Pa. St. 29.

4 Tyler *v.* Moore, 42 Pa. St. 388; Daley *v.* Koons, 90 Pa. St. 246; Webster *v.* Cooper, 14 How. 500; Slater *v.* Dangerfield, 15 Mees. & W. 263; Doe *v.* Davies, 4 Barn. & Adol. 43; Brooks *v.* Evetts, 33 Tex. 732; 1 Greenl. Cruise, 683, note. But compare Perrin *v.* Blake, 4 Burr. 2579.

5 See Payne *v.* Sale, 3 Bat. (N. C.) 455; Powell *v.* Brandon, 24 Miss. 364; Ware *v.* Richardson, 3 Md. 505; Thomas *v.* Higgins, 47 Md. 450; McFeely *v.* Moore, 5 Ohio, 464; 24 Am. Dec. 314; Polk *v.* Faris, 9 Yerg. 209; 30 Am. Dec. 400, 415, note.

6 Kepple's Appeal, 53 Pa. St. 211.

7 McCray *v.* Lipp, 35 Ind. 116.

8 Fulton *v.* Harman, 44 Md. 251; and see Josetti *v.* McGregor, 48 Md. 202; Wayne *v.* Lawrence, 58 Ga. 15.

9 Brownell v. Brownell, 10 R. I. 509; and see Simpers v. Simpers, 15 Md. 160.

10 Gonzales v. Barton, 45 Ind. 295.

11 Andrews v. Spurlin, 35 Ind. 262. Compare Price v. Sisson, 13 N. J. 177; Criswell's Appeal, 41 Pa. St. 290; Kinsel v. Ramsay, 87 Pa. St. 248.

12 1 N. Y. Rev. Stat. 725, § 28; Brown v. Lynn, 6 N. Y. 420; Cal. Civ. Code, § 779; Ala. Rev. Code, § 1574; Williams v. McConnico, 36 Ala. 22; in Kentucky, see Foster v. Shreve, 6 Bush, 519; Massachusetts, see Hatfield v. Sohier, 114 Mass. 48; Missouri, see Wammack v. Whitmore, 58 Mo. 448; Connecticut, see Goodrich v. Lambert, 10 Conn. 454; in West Va., see Code, c. 71, § 11; in Michigan, see Fraser v. Chene, 2 Mich. 93; in Tennessee, Code, § 2068; Virginia, Code, c. 116, § 11.

13 Dennett v. Dennett, 40 N. H. 500; Carter v. Reddish, 32 Ohio St. 1; Den v. Demarest, 21 N. J. L. 525; Akers v. Akers, 23 N. J. Eq. 30; and see 30 Am. Dec. 415, note.

14 Butler v. Huestis, 68 Ill. 594; 18 Am. Rep. 569.

15 Baker v. Scott, 62 Ill. 86; Yarnall's Appeal, 76 Pa. St. 335.

16 Austin v. Railroad Co. 45 Vt. 215; 30 Am. Dec. 415, note. See Doe v. Laming, 2 Burr. 1100; Perrin v. Blake, 4 Burr. 2579.

§ 181. Nature of contingent uses.—Contingent uses are those which are limited to take effect as remainders,[1] for remainders, whether vested or contingent, may be limited by way of use, as well as by conveyances at common law, and such is now the usual way in which they are created.[2] The rule as to the necessity of an estate of freehold to support a contingent remainder[3] holds equally in the limitation of contingent remainders by way of use, as by common law conveyance;[4] and consequently, if the preceding estate is not sufficient to support the use limited by way of remainder, such remainder will be void.[5] Thus, a limitation to trustees or feoffees in fee to the use of A for ninty-nine years, if he so long lived, remainder to the use of the heirs male of B in tail, was held to be a void remainder, since the preceding estate in A was not a freehold.[6] In short, it has been said that future or contingent uses are placed precisely on the same footing with contingent remainders.[7] But where a contingent remainder is limited by way of use to several persons, all of whom do not become capable of taking at the same time, it will vest in the person first becoming capable, subject to be divested as to the proportion of the persons afterwards becoming capable, before the deter-

mination of the particular estate;[8] and they will take jointly, notwithstanding the different times of vesting.[9]

1 See Gilb. Uses, 152, n; 4 Kent Com. 298.

2 1 Greenl. Cruise, 763; 4 Kent Com. 258.

3 See § 176, *ante*.

4 1 Greenl. Cruise, 766; Gilb. Uses, 165.

5 Co. Litt. 217; Burt. Real Prop. 797; Goodtitle *v.* Billington, Doug. 758.

6 Adams *v.* Savage, Salk. 679; 2 Raym. Ld. 854; 2 Wash. Real Prop. 280. Compare State *v.* Trask, 6 Vt. 363.

7 Gilb. Uses, 177, n. See 4 Kent Com. 238, *et seq.*; Chudleigh's Case, 1 Rep. 132 *b*; Penhay *v.* Hurrell, 2 Freem. 258; Shapleigh *v.* Pilsbury, 1 Me. 271; 1 Greenl. Cruise, 766.

8 1 Greenl. Cruise, 767; Sussex *v.* Temple, 1 Raym. Ld. 311.

9 1 Greenl. Cruise, 767; and see Dingley *v.* Dingley, 5 Mass. 535; Carroll *v.* Hancock, 3 Jones (N. C.) 471.

§ 182. Springing uses.—Uses limited to arise on a future event, either certain or contingent, without any preceding estate to support them, are usually called springing uses.[1] In all cases of springing uses the estate remains in the original owner till the use arises.[2] Thus, a grant to A in fee, to the use of B in fee, after the first day of January next, is an instance of a springing use, and no use arises until the limited period;[3] the use, in the mean time, resulting to the grantor, who has a determinable fee.[4] The distinction between a future or contingent use and a springing use is thus explained: A feoffment to the use of A for life, and after the death of A and B to C in fee, is a contingent remainder to C; but a feoffment to the use of C in fee, after the death of A and B, is a springing use.[5] A use limited by way of remainder will not be construed into a springing use.[6]

1 1 Greenl. Cruise, 768; Mutton's Case, Dyer, 274 *b*; Moo. 517; Weale *v.* Lower, Pol. 65.

2 1 Greenl. Cruise, 770; and see Shapleigh *v.* Pilsbury, 1 Me. 271.

3 4 Kent Com. 298; Weale *v.* Lower, Pol. 65.

4 Woodliff *v.* Drury, Cro. Eliz. 439; Mutton's Case, Dyer, 274 *b*; Moo. 517.

5 Weale *v.* Lower, Pol. 65; 2 Wash. Real Prop. 283.

6 Cole *v.* Sewell, 4 Dru. & Walsh, 27; Southcote *v.* Stowell, 1 Mod. 238; Carwardine *v.* Carwardine, 1 Eden, 34.

§ 183. Shifting uses.—Shifting or secondary uses are such as take effect in derogation of some other estate, and are either limited expressly by the deed creating them, or are authorized to be created by some person named in the deed.[1] They are limited so as to change by matter *ex post facto;*[2] as in the case of an ordinary marriage settlement, the first use is always to the owner in fee until the marriage, and then it shifts to other uses as they arise.[3] A shifting use cannot be limited on a shifting use;[4] and such uses must be confined within proper limits, so as not to lead to a perpetuity.[5] By the English law, if the time within which a shifting use be limited to take effect may exceed a period within a life or lives in being, and twenty-one years and a fraction afterwards, the limitation will be void.[6] But a shifting use limited after an estate tail is not void within the rule of law against perpetuities.[7]

1 Gilb. Uses, Sugd. ed. 152; 4 Kent Com. 296; Lloyd *v.* Carew, Show. Parl. C. 137; Harwell *v.* Lucas, 1 Leon. 264; Winchelsea *v.* Wentworth, 1 Vern. 402.

2 1 Greenl. Cruise, 770.

3 Wms. Real Prop. 243; 4 Kent Com. 297; Carwardine *v.* Carwardine, 1 Eden, 34. And see Carr *v.* Erroll, 14 Ves. 478; Stanley *v.* Stanley, 16 Ves. 491; Doe *v.* Yates, 5 Barn. & Ald. 344.

4 1 Greenl. Cruise, 774.

5 Gilb. Uses, Sugd. ed. 260, n.

6 Cadell *v.* Palmer, 1 Clark & F. 372; and see Proprietors etc. *v.* Grant, 3 Gray, 142, 152.

7 Spencer *v.* Duke of Marlborough, 5 Brown Parl. C. 592; Goodwin *v.* Clark, 1 Lev. 35.

CHAPTER XVII.

REVERSIONS.

§ 184. Definition.
§ 185. Nature and incidents of.
§ 186. Merger.
§ 187. Remedy for waste, etc.
§ 188. In case of lands held by corporation.

§ 184. Definition.—A reversion is the second kind of estate in expectancy, and it arises from construction of

law.[1] It is defined to be "the return of land to the grantor and his heirs after the grant is determined."[2] Or, "it is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised."[3] It is founded on the principle that where a person has not parted with his whole estate and interest in a piece of land, all that which he has not given away remains in him, and the possession of it reverts or returns to him upon the determination of the preceding estate.[4]

1 § 172, *ante;* 2 Blackst. Com. 175; and see Hitchman *v.* Walton, 4 Mees. & W. 409; Rochell *v.* Tompkins, 1 Strob. Eq. 114.

2 Co. Litt. 142 *b*; Plow. 151; 4 Kent Com. 353.

3 1 N. Y. Rev. Stat. 743, § 12; and see 2 Blackst. Com. 175; Harper *v.* Blean, 3 Watts, 471; 27 Am. Dec. 367; Phœnix *v.* Commissioners etc. 1 Abb. Pr. 466; 12 How. Pr. 1.

4 1 Greenl. Cruise, 817; Co. Litt. 183 *b*; and see Payn *v.* Beal, 4 Denio, 411; Burton *v.* Barclay, 7 Bing. 745.

§ 185. Nature and incidents of.—A reversion is a present vested estate, though it is only to take effect in possession and profit *in futuro*.[1] It is an incorporeal hereditament, and may be conveyed in whole or part by grant without livery of seizin,[2] and is subject to most of the liabilities incident to an estate in possession.[3] Under the English law, the usual incidents to a reversion are fealty and rent;[4] and although the former is unknown in this country, the latter is an important incident, and passes with a grant or assignment of the reversion.[5] It may, however, be excepted by the reversioner from a transfer of his estate.[6] And the rent may be assigned without the reversion.[7] A reversion expectant on an estate for years is said to be subject to courtesy and dower;[8] otherwise as to a reversion expectant on a freehold.[9]

1 1 Greenl. Cruise, 820; 2 Blackst. Com. 175.

2 Co. Litt. 49 *a*; 4 Kent Com. 354; Doe *v.* Cole, 7 Barn. & C. 243; Jones *v.* Roe, 3 Term Rep. 93. See Cook *v.* Hammond, 4 Mason, 467, 485; Miller *v.* Miller, 10 Met. 393.

3 1 Greenl. Cruise, 820; and see Smith *v.* Angel, 7 Mod. 40; Symonds *v.* Cudmore, 4 Mod. 1; Whitney *v.* Whitney, 14 Mass. 91; Moore *v.* Richardson, 37 Me. 438; Burton *v.* Smith, 13 Peters, 464. That a rever-

sionary interest in real estate may be the subject of levy and sale upon execution: see Woodgate *v.* Fleet, 44 N. Y. 1; 44 N. Y. 21, note.

4 2 Blackst. Com. 176.

5 Burden *v.* Thayer, 3 Met. 76; Kimball *v.* Pike, 18 N. H. 419; Peck *v.* Northrop, 17 Conn. 217; Demarest *v.* Willard, 8 Cowen, 206.

6 Co. Litt. 143 *a*; Demarest *v.* Willard, 8 Cowen, 206.

7 Co. Litt. 143 *a*.

8 Co. Litt. 29 *a*; 1 Greenl. Cruise, 823.

9 1 Greenl. Cruise, 823; and see Robison *v.* Codman, 1 Sum. 130.

§ 186. Merger.—If the reversion and the particular estate on which it depends coincide, and meet in one and the same person, the particular estate merges in the reversion;[1] in other words, the reversion becomes an estate in possession, by the removal of that which interposed between the right and the enjoyment in the reversion.[2]

1 1 Greenl. Cruise, 827; 2 Blackst. Com. 177. See Allen *v.* Anderson, 44 Ind. 325.

2 2 Wash. Real Prop. 394; and see Stephens *v.* Bridges, 6 Madd. 66; Hughes *v.* Robotham, Cro. Eliz. 303.

§ 187. Remedy for waste, etc.—A reversioner has such an interest in the estate that he can maintain an action for an injury done to the inheritance.[1] But to entitle him to do so, the injury must be such as is necessarily prejudicial to his reversionary right;[2] and if the act be injurious only to the particular tenant, he alone can maintain the action.[3] Timber trees cut without right by the tenant for life or a stranger become immediately upon severance the property of the reversioner, and he may maintain an action for them.[4] But reversioners entitled to land only upon the determination of a life estate have no right to authorize the cutting of trees standing upon the land during the term for life.[5]

1 Jesser *v.* Gifford, 4 Burr. 2141; Bartlett *v.* Perkins, 13 Me. 87; Ripka *v.* Sargeant, 7 Watts & S. 9; Ray *v.* Ayers, 5 Duer, 494.

2 Randall *v.* Cleveland, 6 Conn. 328; Little *v.* Palister, 3 Me. 6.

3 Jackson *v.* Pesked, 1 Maule & S. 234. In New York, by statute, the reversioner or remainder-man may maintain an action of waste or trespass for any injury done to the inheritance, notwithstanding any intervening estate for life or years: 1 Rev. Stat. 750, § 8; and see Livingston *v.* Haywood, 11 Johns. 429.

4 Richardson *v.* York, 14 Me. 216.

5 Simpson v. Bowden, 33 Me. 549. A house built and occupied by a reversioner, with the assent of the tenant for life, is not personal but real estate, and a conveyance thereof by the reversioner will not entitle the grantee to enter and occupy the house against the tenant for life: Cooper v. Adams, 6 Cush. 87.

§ 188. In case of lands held by corporation.—Corporations, though limited in their duration, may purchase and hold a fee, and may sell such real estate whenever they shall find it no longer necessary or convenient to hold it.[1] They have, however, only a determinable fee for the purpose of enjoyment; and on the dissolution of the corporation, the reversion is to the original grantor or his heirs.[2] But the grantor will be excluded by an alienation in fee by the corporation, and in that way the possibility of a reversion be defeated.[3]

1 Nicoll v. N. Y. etc. R. R. Co. 12 N. Y. 129; see Boone Corp. §§ 95, 250.

2 2 Kent. Com. 282; Boone Corp. § 250; and see Underhill v. Saratoga etc. R. R. 20 Barb. 455.

3 2 Kent Com. 282; Buffalo Pipe Line Co. v. N. Y. etc. R. R. Co. 10 Abb. N. C. 107. In case of a deed in perpetuity, a clause, "the premises being hereby conveyed for the uses and purposes of a railroad, and for no other purposes," does not prevent the fee from vesting, nor restrain alienation by the grantee, but is only a condition subsequent, raising a possibility of reverter: Buffalo Pipe Line Co. v. N. Y. etc. R. R. Co. 10 Abb. N. C. 107.

CHAPTER XVIII.

POWERS.

§ 189. Definition and nature.
§ 190. Classification.
§ 191. How created.
§ 192. Under statute of New York.
§ 193. Who may execute.
§ 194. How executed.
§ 195. Delegation of.
§ 196. How extinguished.

§ 189. Definition and nature.—Powers constitute an important branch of the law of real property in England, but the American decisions on the subject are few, and it has not been made, to any great extent, the

matter of statutory regulation in the different States.[1] A power is defined to be "an authority enabling a person to dispose, through the medium of the statute of uses, of an interest, vested either in himself or in another person."[2] Or, it is a "method of causing a use with its accompanying estate to spring up at the will of a given person."[3] As thus defined, powers derive their effect from the statute of uses, and they have been classed under the head of contingent uses.[4] An illustration of the operation of a power is where an estate is conveyed to A and his heirs, to the use of B for life, remainder to such uses generally, or to such son of B as B shall appoint, and B appoints to the use of his first son; immediately upon the appointment the use is executed in the son.[5] The one who confers the power is called the donor; the one who executes it, the appointer or donee; and the one in whose favor it is executed, the appointee.[6]

1 See 2 Greenl. Cruise, 474, n.; 2 Wash. Real Prop. 312.

2 Clere's Case, 6 Coke, 17 *b*; Sugd. Pow. 82; 4 Kent Com. 316.

3 1 Wms. Real Prop. 245; and see 2 Wash. Real Prop. 300. Compare Hunt *v.* Rousmaniere, 8 Wheat. 174; Mansfield *v.* Mansfield, 6 Conn. 559; 16 Am. Dec. 76.

4 4 Kent Com. 315; 1 Wms. Real Prop. 245; Co. Litt. 271 *b*, n.; and see Burt. Real Prop. § 172.

5 Co. Litt. 271 *b*, n.; 2 Wash. Real Prop. 302; and see Rush *v.* Lewis, 21 Pa. St. 72.

6 4 Kent. Com. 316.

§ 190. Classification.—A power may be given to one who has an interest in the lands in respect to which the power is to be executed, or it may be given to a stranger;[1] and this is the foundation of the general division of powers into those which relate to the land and those which are simply collateral to it.[2] The former are again subdivided into powers appendant or appurtenant and powers in gross.[3] A power appendant or appurtenant is one which the donee of the power is authorized to execute out of the estate limited to him; as, for instance, where a tenant for life has a power of making leases in possession.[4] A power in gross is one which does not

attach on the interest of the party, but which enables him to create an estate independent of his own.[5] Thus, if a tenant for life has a power of creating an estate to commence after his own ends, as a term for years to commence after his death, it is a power in gross, because the estate for life has no concern in it.[6] Powers simply collateral are those given to mere strangers, who have no interest in the land.[7] A more simple classification of powers is into general and particular; the former to be exercised in favor of any person whom the appointer chooses, the latter to be exercised in favor of specific objects.[8]

1 2 Greenl Cruise, 475; 2 Wash. Real Prop. 305.

2 2 Greenl. Cruise, 475.

3 2 Greenl. Cruise, 175; 4 Kent Com. 316, 317.

4 Burt. Real Prop. § 179; Clere's Case, 6 Coke, 17 *b*; Bergen *v.* Bennett, 1 Caines Cas. 15.

5 Burt. Real Prop. § 180; 4 Kent Com. 317.

6 2 Greenl. Cruise, 476; Edwards *v.* Sleater, Hardr. 416; Wilson *v.* Troup, 2 Cowen, 236.

7 Bergen *v.* Bennett, 1 Caines Cas. 15; Addison *v.* Bowie, 2 Bland, 618. Powers simply collateral are construed strictly: Darlington *v.* Pulteny, Cowp. 260; Zouch *v.* Woolston, 2 Burr. 1136; 1 Black. W. 281.

8 4 Kent Com. 318.

§ 191. How created.—Powers may be created either by deed or by will, by grant or reservation, and no technical form of words is requisite.[1] It is sufficient if the intention of the person who creates the power be clearly manifested;[2] and the rule of equitable construction will be applied in furtherance of that intention.[3]

1 4 Kent Com. 319; 1 Sugd. Pow. 96; Snape *v.* Tourton, 2 Rolle Abr. 215; Dorland *v.* Dorland, 2 Barb. 80; Taylor *v.* Meads, 4 DeGex, J. & S. 597.

2 2 Greenl. Cruise, 477; and see Jackson *v.* Shauber, 7 Cowen, 187; Peter *v.* Beverly, 10 Pet. 532; Jameson *v.* Smith, 4 Bibb, 307; Funk *v.* Eggleston, 92 Ill. 515; 34 Am. Rep. 136. In the construction of powers, the intention of the parties governs the court: Pomerey *v.* Partington, 3 Term Rep. 665; Smith *v.* Doe, 3 Bligh, 290.

3 Jackson *v.* Veeder, 11 Johns. 169; Ren *v.* Bulkeley, Doug. 293; Right *v.* Thomas, 3 Burr. 1446; Griffith *v.* Harrison, 4 Burr. 749.

§ 192. Under statute of New York.—The New York Revised Statutes abolished the existing law of powers, and established new provisions for their creation, con-

struction, and execution.[1] They define a power to be an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner, granting or reserving such power, might himself lawfully perform;[2] and they classify powers as general or special, and beneficial or in trust.[3] A power is general when it authorizes a conveyance, devise, or charge in fee, to any person whatever.[4] It is special when the appointee is designated, or a lesser interest than a fee is authorized to be conveyed.[5] It is beneficial when no person other than the grantee is interested.[6] A general power is in trust when some designated third person is to be benefited by the execution, wholly or in part.[7] A special power is in trust when it authorizes dispositions only to some person or class other than the grantee of the power, or for the benefit of such person or class.[8] The statute uses the term "grantor of a power" to designate the person by whom a power is created; and the term "grantee of a power" to designate the person in whom a power is vested.[9]

1 1 Rev. Stat. 732, § 73; and see Belmont v. O'Brien, 12 N. Y. 403.
2 1 Rev. Stat. 732, § 74; Selden v. Vermilyea, 1 Barb. 62.
3 1 Rev. Stat. 732, § 76.
4 1 Rev. Stat. 732, § 77; Tallmadge v. Sill, 21 Barb. 51, 52; Selden v. Vermilyea, 1 Barb. 62.
5 1 Rev. Stat. 732, § 78; Barber v. Cary, 11 N. Y. 402.
6 1 Rev. Stat. 732, § 79; Jackson v. Edwards, 22 Wend. 498.
7 1 Rev. Stat. 734, § 94; Selden v. Vermilyea, 1 Barb. 62.
8 1 Rev. Stat. 734, § 95; Selden v. Vermilyea, 1 Barb. 58; Farmers' Loan & Trust Co. v. Carroll, 5 Barb. 652.
9 1 Rev. Stat. 738, § 135; Barber v Cary, 11 N. Y. 401.

§ 193. Who may execute.—Every person having the capacity to dispose of an estate actually vested in himself may execute a power over land.[1] Even an infant may execute a power simply collateral;[2] and a married woman may execute any kind of power, without her husband's consent, and whether it was given to her before or after marriage.[3] And she may even execute it in favor of her husband.[4]

1 Sugd. Pow. 148; 4 Kent Com. 324; Logan v. Bell, 1 Com. B. 872.

2 2 Greenl. Cruise, 482; 4 Kent Com. 324; and see 1 N. Y. Rev. Stat. 735, § 109.

3 2 Greenl. Cruise, 485; Sugd. Pow. 148, *et seq.*; 1 N. Y. Rev. Stat. 735, § 110; Wright v. Tallmadge, 15 N. Y. 307. See Oliver v. Oliver, 10 Ch. Div. 765; 27 Eng. R. 268.

4 Hoover v. Samaritan Society, 4 Whart. 445; Bradish v. Gibbs, 3 Johns. Ch. 523; Rush v. Lewis, 21 Pa. St. 72; Doe v. Eyre, 5 Com. B. 741.

§ 194. How executed.—If the mode in which a power shall be executed is not prescribed, it may be done by deed or will, or even by an unsealed writing.[1] But if a form be prescribed, the law requires that the conditions annexed to the exercise of the power be strictly adhered to.[2] A power to appoint by deed cannot be executed by will, nor *vice versa*.[3] If a power is required to be exercised by a writing, "under hand and seal attested by witnesses," it is sufficient that witnesses actually attested it, though not stated to be so done in an attestation clause.[4] Ordinarily, a power to sell and convey does not confer a power to mortgage.[5] And a power to sell for a specific sum means a cash sale, and not one for approved notes,[6] unless there be something in the power itself or usage of trade varying such construction.[7] Where two or more persons are named as donees, all must ordinarily join in the execution of the power, unless the contrary is expressed.[8] When the power given to several persons is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive;[9] but when the power is coupled with an interest, it may be executed by the survivor.[10]

1 4 Kent Com. 320; Hawkins v. Kemp, 3 East, 430; Doe v. Peach, 2 Maule & S. 576. See Portland v. Topham, 11 H. L. Cas. 32; Buller v. Burt, 6 Nev. & M. 281. Every execution of a power must have a reference to the original instrument creating that power: Robinson v. Hardcastle, 2 Term R. 241.

2 Longford v. Eyre, 1 P. Wms. 740; Ex parte Williams, 1 Jac. & W. 93; Wright v. Wakeford, 17 Ves. 454; Doe v. Smith, 1 Brod. & B. 97; 2 Brod. & B. 473.

3 Darlington v. Pulteny, Cowp. 260.

4 Vincent v. Bishop of Sodor etc. 5 Ex. 683; and see Ladd v. Ladd, 8 How. 40.

5 Bloomer v. Waldron, 3 Hill, 366; Hoyt v. Jaques, 129 Mass. 286;

Stokes *v.* Payne, 58 Miss. 614; 38 Am. Rep. 340; Devaynes *v.* Robinson, 24 Beav. 86. A power to "sell and exchange" lands embraces a power to partition: Phelps *v.* Harris, 101 U. S. 370. And where a party has power to appoint a fee, in the absence of words of positive restriction, a less estate may be appointed: Butler *v.* Heustis, 68 Ill. 594; 18 Am. Rep. 589.

6 Ives *v.* Davenport, 3 Hill, 373; 4 Kent Com. 331. Power to sell does not include power to exchange lands: City of Cleveland *v.* State Bank, 16 Ohio St. 268.

7 Ives *v.* Davenport, 3 Hill, 373.

8 Co. Litt. 112 *b*; 2 Wash. Real Prop. 322; and see Cal. Civ. Code, § 860.

9 Peter *v.* Beverly, 10 Peters, 564; Franklin *v.* Osgood, 14 Johns. 553; 2 Johns. Ch. 19; Tainter *v.* Clark, 13 Met. 225; Brassey *v.* Chalmers, 16 Beav. 231.

10 Franklin *v.* Osgood, 14 Johns. 553; Peter *v.* Beverly, 10 Peters, 564. See Mansfield *v.* Mansfield, 6 Conn. 559; 16 Am. Dec. 76; Bergen *v.* Bennett, 1 Caines Cas. 16.

§ 195. Delegation of.—If the power be accompanied by a personal trust or confidence, it cannot be delegated to another, unless authority to delegate it be expressly given.[1] But this rule has no application to mere formal acts;[2] and if a power be expressly limited to a donee and his assigns, an execution of it by an assignee will in such case be good, and a devisee of the donee will be considered as within the words of the power.[3]

1 Tainter *v.* Clark, 13 Met. 226; Berger *v.* Duff, 4 Johns. Ch. 368; Cole *v.* Wade, 16 Ves. 27; Topham *v.* Portland, 1 DeGex, J. & S. 517.

2 2 Greenl. Cruise, 554; Cole *v.* Wade, 16 Ves. 27.

3 Englefield's Case, 7 Rep. 11; 2 Greenl. Cruise, 554.

§ 196. How extinguished.—Powers, whether relating to the land or simply collateral to it, may be extinguished by a complete execution of them;[1] and a power relating to the land, whether appendant or in gross, will be extinguished by a total alienation of the estate.[2] Any assurance which carries the whole of the grantor's estate operates as a total destruction of all powers appendant to it.[3] But a conveyance of a part of the land is an extinguishment of the power as to that part only, and the power remains as to the residue.[4] So a power appendant may be suspended; as where the donee of the power conveys the land only for the purpose of creating a particular

estate, this suspends the execution of the power during the continuance of the estate created.[5] A power given to one having a particular estate in the land is held to be merged or extinguished by his acquisition of the fee.[6] Powers simply collateral to the land cannot be extinguished or destroyed by a feoffment or any other conveyance of the land.[7] The donee of such a power cannot, by any act of his own, extinguish or destroy it.[8]

1 2 Greenl. Cruise, 576; and see Zouch *v.* Woolston, 1 Black. W. 281; 2 Burr. 1136; Hawkins *v.* Kemp, 3 East, 410.

2 4 Kent Com. 347; Ren *v.* Bulkeley, Doug. 292. Where the owner of an equitable, executed fee, with power of appointment, conveys the property in fee-simple, with covenants of general warranty, the power is thereby extinguished: Brown *v.* Renshaw, Ct. App. (Md.) 12 Rep. 622.

3 Sugd. Pow. 57; Barton *v.* Briscoe, 1 Jacob, 603; and see 4 Kent Com. 347.

4 2 Greenl. Cruise, 578; Hob. 313.

5 Bringloe *v.* Goodson, 4 Bing. N. C. 734; Vincent *v.* Ennys, 3 Vin. Abr. 432; Goodright *v.* Cator, Doug. 477.

6 Maundrell *v.* Maundrell, 7 Ves. 567; Cross *v.* Hudson, 3 Bro. C. C. 30; and see Wilson *v.* Troup, 2 Cowen, 195. But see Clere's Case, 6 Coke, 17 *b*; 4 Kent Com. 348; 2 Greenl. Cruise, 584, n.

7 Digge's Case, 1 Rep. 174 *a*; F. Moore, 605; 2 Greenl. Cruise, 582.

8 Willis *v.* Sherral, 1 Atk. 474; West *v.* Barney, 1 Russ. & M. 391; Tippet *v.* Eyres, 2 Vent. 110; 5 Mod. 457. A naked power may be revoked at pleasure, but a power coupled with an interest is irrevocable: Mansfield *v.* Mansfield, 6 Conn. 559; 16 Am. Dec. 76.

CHAPTER XIX.

EXECUTORY DEVISES.

§ 197. Definition and nature.
§ 198. How classified.
§ 199. Executory devise or remainder.
§ 200. When too remote.
§ 201. May be assigned, etc.

§ 197. Definition and nature.—An executory devise, so far as it embraces lands, is defined to be "such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law."[1]

When it was clear that the testator intended a contingent remainder, and it could not operate as such by the rules of law, the limitation was then, out of indulgence to wills, held to be good as an executory devise.[2] Executory devises are not naked possibilities, but are in the nature of contingent remainders;[3] and much of the learning relating to them consists in the application of rules distinguishing them from the latter.[4] It is said that they took their rise in the time of Elizabeth;[5] though the law upon the subject seems not to have been fully settled until a much later period.[6]

1 Fearne Cont. Rem. 386; and see 2 Blackst. Com. 172; 4 Kent. Com. 263; 2 Wash. Real Prop. 341; Wead v. Gray, 8 Mo. App. 515; Moffat v. Strong, 10 Johns. 12; Jackson v. Bull, 10 Johns. 19.

2 4 Kent Com. 263; 3 Greenl. Cruise, 451; Goodtitle v. Wood, Willes, 211; Nightingale v. Burrell, 15 Pick. 104; Richardson v. Noyes, 2 Mass. 56; 3 Am. Dec. 24, 33.

3 Goodtitle v. Wood, Willes, 211; and see Jones v. Roe, 3 Term Rep. 88; Purefoy v. Rogers, 2 Wms. Saund. 388, note.

4 2 Wash. Real Prop. 341; and see Nightingale v. Burrell, 15 Pick. 104; Dunwoodie v. Read, 3 Serg. & R. 440.

5 Jones v. Roe, 3 Term Rep. 95.

6 See Pells v. Brown, Cro. Jac. 590; Cadell v. Palmer, 10 Bing. 140; Thellusson v. Woodford, 1 Bos. & P. N. R. 357; 2 Wash. Real Prop. 343; 4 Kent Com. 264.

§ 198. How classified.—Executory devises of freeholds are of two kinds:[1] (1) Where an estate is devised to one, but upon some future event that estate is determined, and the estate thereupon is to go to another;[2] as, if there be a devise to A and his heirs, provided that if he die within age, then the land should remain to B and his heirs, B's interest is an executory devise.[3] (2) Where the testator, without parting with the immediate fee, gives a future interest to arise either upon a contingency or at a period certain;[4] as where A devised lands to B in fee, to commence and take effect at the end of six months after the testator's death, this was adjudged to be a good executory devise.[5] So a devise to an infant, when he should be born, is good as an executory devise of this kind.[6] A third class or kind of executory devises com-

prises all chattel interests;[7] and most of the rules which are applicable to the first two classes above mentioned apply also to this third class.[8]

1 Fearne Cont. Rem. 399; Scatterwood v. Edge, 1 Salk. 229; and see 4 Kent Com. 268; 2 Wash. Real Prop. 343.

2 Marks v. Marks, 10 Mod. 423; Nightingale v. Burrell, 15 Pick. 111.

3 Nightingale v. Burrell, 15 Pick. 110; and see Lent v. Archer, 1 Salk. 226; Purefoy v. Rogers, 2 Wms. Saund. 388, note; Wells v. Ritter, 3 Whart. 208; Langley v. Heald, 7 Watts & S. 96; Proprietors etc. v. Grant, 3 Gray, 151; Jackson v. Kip, 2 Paine, 366.

4 Nightingale v. Burrell, 15 Pick. 111; 3 Greenl. Cruise, 467; Richardson v. Noyes, 2 Mass. 56; 3 Am. Dec. 32.

5 Clarke v. Smith, 1 Lutw. 798; and see Lent v. Archer, 1 Salk. 226; Bate v. Amherst, Raym. T. 82; Chambers v. Wilson, 2 Watts, 495; Leslie v. Marshall, 31 Barb. 567.

6 3 Greenl. Cruise, 468; Doe v. Carleton, 1 Wils. 206, 225.

7 Fearne Cont. Rem. 399; Hoare v. Parker, 2 Term Rep. 376; Burt. Real Prop. § 946.

8 See Burt. Real Prop. §§ 955, 956; 2 Wash. Real Prop. 377.

§ 199. Executory devise or remainder.—An executory devise being a disposition contrary to the rules established for the construction of conveyances at common law,[1] it has been adopted as a fixed and settled rule, that whenever a future interest in lands is so devised that conformably to the rules of law it can take effect as a remainder, it shall be construed to be a remainder, and not an executory devise.[2] But a remainder cannot be limited after a fee, while an executory devise may be so limited;[3] and therefore, if the prior estate is a fee-simple, the second must be an executory devise.[4] So a remainder must have a particular estate to precede and support it, which an executory devise does not require.[5] And a third point of difference is, that by means of an executory devise, a term for years may be limited over after a life estate created in the same.[6] It may also be observed that an executory devise cannot be prevented or destroyed by any alteration in the estate out of which or after which it is limited;[7] but at common law the effect of the destruction of the estate upon which a contingent remainder depends before it shall become vested is to destroy the remainder.[8]

1 See 1 Greenl. Cruise, 457; Nightingale *v.* Burrell, 15 Pick. 110.

2 Purefoy *v.* Rogers, 2 Wms. Saund. 388; Doe *v.* Morgan, 3 Term Rep. 763; Wolfe *v.* Van Nostrand, 2 N. Y. 436; Johnson *v.* Valentine, 4 Sand. 36; Willis *v.* Beecher, 3 Wash. C. C. 369; Manderson *v.* Lukens, 23 Pa. St. 31; Hawley *v.* Northampton, 8 Mass. 3; Nightingale *v.* Burrell, 15 Pick. 110.

3 2 Blackst. Com. 173; Gulliver *v.* Wickett, 1 Wils. 105; Richardson *v.* Noyes, 2 Mass. 56; 3 Am. Dec. 32; Brightman *v.* Brightman, 100 Mass. 238.

4 Nightingale *v.* Burrell, 15 Pick. 111.

5 2 Blackst. Com. 173; and see §§ 172, 176, *ante*.

6 2 Blackst. Com. 173; 4 Kent Com. 270; Eichelberger *v.* Bernetz, 17 Serg. & R. 293; Wilkinson *v.* South, 7 Term Rep. 555; Doe *v.* Frost, 3 Barn. & Ald. 541; and see Hill *v.* Hill, 74 Pa. St. 173; 15 Am. Rep. 545.

7 Pells *v.* Brown, Cro. Jac. 590; Bullock *v.* Bennett, 24 Law. J. (N. S.) Ch. 397; 31 Eng. L. & Eq. 463; Boyd *v.* Bingham, 4 Pa. St. 102; Jackson *v.* Robins, 16 Johns. 537; Proprietors etc. *v.* Grant, 3 Gray, 150; Downing *v.* Wherin, 19 N. H. 9. Compare Page *v.* Hayward, 2 Salk. 570; Den *v.* Cox, 3 Dev. 394.

8 See § 178, *ante*; Jackson *v.* Bull, 10 Johns. 19; Doe *v.* Howell, 10 Barn. & C. 230.

§ 200. When too remote.—Where an executory devise is limited on an event which may not happen within the compass of a life or lives in being, and twenty-one years and nine months after,[1] it is void, as being too remote, and tendering to a perpetuity;[2] in which case, the first taker holds his estate discharged of the condition or limitation over.[3] Thus, if the prior limitation is to take effect after a dying "without heirs," or "without issue," or "on failure of issue," or the like, without additional words indicating a definite time at which such failure is to occur, the limitation is held to be void, because the contingency is not to take place until after an indefinite failure of issue.[4] And a limitation which will not necessarily take effect, if at all, within the time prescribed by the rule against perpetuities, will not be made valid by any events happening subsequently to the time of the creation of the limitation.[5] But when a limitation is made to take effect on the happening of either of two events, one of which is too remote, but the other is not, it will be allowed to take effect on the happening of the latter event.[6]

1 See 3 Greenl. Cruise, 452; Cadell *v.* Palmer, 10 Bing. 140; Tud. Lead. Cas. 357; Anderson *v.* Jackson, 16 Johns. 399; Proprietors etc. *v.* Grant, 3 Gray, 152.

2 Nightingale *v.* Burrell, 15 Pick. 111; Cadell *v.* Palmer, 10 Bing. 140; 1 Clark & F. 372; Tud. Lead. Cas. 357; Proprietors etc. *v.* Grant, 3 Gray, 152.

3 Beard *v.* Westcott, 5 Barn. & Ald. 801; Proprietors etc. *v.* Grant, 3 Gray, 156.

4 4 Kent Com. 273; Tenny *v.* Agar, 12 East, 253; Doe *v.* Rivers, 7 Term Rep. 276; Irwin *v.* Dunwoody, 17 Serg. & R. 61; Hall *v.* Priest, 6 Gray, 20; Dallam *v.* Dallam, 7 Har. & J. 220; Paterson *v.* Ellis, 11 Wend. 259. Compare Kay *v.* Scates, 37 Pa. St. 39; Morgan *v.* Morgan, 5 Day, 517; Gray *v.* Bridgeforth, 33 Miss. 312.

5 Nightingale *v.* Burrell, 15 Pick. 111; Fowler *v.* Depan, 26 Barb. 237; Proprietor etc. *v.* Gray, 152, 153; and see St. Amour *v.* Rivard, 2 Mich. 294; Crompe *v.* Barrow, 4 Ves. 681.

6 Longhead *v.* Phelps, 2 Black. W. 704; Armstrong *v.* Armstrong, 14 Mon. B. 333; Minter *v.* Wraith, 13 Sim. 62; Evers *v.* Challis, 7 H. L. Cas. 555; Fowler *v.* Depan, 26 Barb. 238.

§ 201. May be assigned, etc.—Executory devises, and all possibilities coupled with an interest where the person to take is ascertained and *in esse*, may be assigned or devised, and are transmissible to the representatives of the devisee, if he dies before the contingency happens;[1] and when the contingency does happen, they vest in the representative of the real or personal estate, as the case may be.[2] But it is otherwise if the person who is to take is not ascertained.[3]

1 Goodtitle *v.* Wood, Willes, 211; Jones *v.* Rowe, 3 Term Rep. 88; Goodright *v.* Searle, 7 Wils. 29; Goodtitle *v.* White, 15 East, 174; Purefoy *v.* Rogers, 2 Wms. Saund. 388; Hall *v.* Robinson, 3 Jones Eq. 348; Kean *v.* Hoffecker, 2 Har. (Del.) 103; 29 Am. Dec. 336.

2 Pinbury *v.* Elkin, 1 P. Wms. 563; Kean *v.* Hoffecker, 2 Har. (Del.) 103; 29 Am. Dec. 336; and see Edwards *v.* Varick, 5 Denio, 682; Lewis *v.* Smith, 1 Ired. 145.

3 Kean *v.* Hoffecker, 2 Har. 103; 29 Am. Dec. 336.

CHAPTER XX.

ESTATE UPON CONDITION.

§ 202. Definition.
§ 203. Express or implied.
§ 204. Precedent or subsequent.
§ 205. May be annexed to any estate.
§ 206. When created.
§ 207. Words implying a condition.
§ 208. Void conditions.
§ 209. Performance of condition.

§ 210. Who bound by condition.
§ 211. When condition is excused or waived.
§ 212. Enforcement of condition.
§ 213. Relief on breach of condition.
§ 214. Conditional limitation.

§ 202. Definition.—An estate upon condition is defined to be one "which may be created, enlarged, or defeated by the happening or not happening of some contingent event."[1] Such estates are more properly qualifications of other estates than a distinct species of themselves.[2] And it has been said that, at common law, the only modification of estates was by condition.[3]

1 1 Wash. Real Prop. 445; and see Co. Litt. 201 *a*; 2 Blackst. Com. 152; 4 Kent Com. 121; Wheeler v. Walker, 2 Conn. 200.

2 2 Blackst. Com. 152.

3 Ld. Mansfield, Doe v. Hutton, 3 Bos. & P. 654, n.

§ 203. Express or implied.—A condition annexed to an estate may be either express or implied.[1] An express condition, or condition in deed, is one which is expressed in the instrument by which the estate is created;[2] as, for instance, a condition in a lease reserving rent, payable on a certain day, that if it is not paid on that day the lessor may re-enter.[3] An implied condition, or condition in law, is one which is impliedly annexed to an estate, although no condition be expressed in words.[4] Thus, at common law, if the tenant for life or years aliened his land by feoffment, it was a forfeiture of the estate;[5] being a breach of the condition which the law annexes thereto, namely, that the tenant shall not attempt to create a greater estate than he was entitled to.[6] So the law tacitly annexed to the grant of every estate a condition that the grantee should not commit felony or treason.[7] And franchises are held to be granted on the tacit condition that a proper use be made of them, and they may be lost or forfeited by abuse or neglect.[8]

1 4 Kent Com. 121.

2 Co. Litt. 215; 1 Greenl. Cruise, 466; and see Bear v. Whisler, 7

Watts, 144; Sperry *v.* Pond, 5 Ham. (Ohio) 389. The intention of the parties to a deed as to whether an estate upon condition has been created, must be determined by the court from the words of the deed itself, and should not be submitted to a jury: Hammond *v.* Port Royal etc. Railw. Co. 15 S. C. 10.

3 1 Greenl. Cruise, 466. See Hickman *v.* Cantrell, 9 Yerg. 172; 30 Am. Dec. 396; Van Rensselaer *v.* Ball, 19 N. Y. 100.

4 2 Blackst. Com. 152; Co. Litt. 215 *b*.

5 Co. Litt. 215 *a*; Co. Litt. 251 *b*.

6 2 Blackst. Com. 153; and see § 39, *ante*.

7 1 Greenl. Cruise, 466; 2 Blackst. Com. 153.

8 2 Blackst. Com. 153; and see § 134, *ante*.

§ 204. Precedent or subsequent.—Conditions are either precedent or subsequent.[1] The former are such as must take place or be performed before the estate can vest, or be enlarged; while the latter are such as, when they do take place, render an estate already vested liable to be defeated.[2] No technical form of words necessarily makes a stipulation precedent or subsequent,[3] and whether a condition shall be regarded as the one or the other will depend on a fair construction of the contract and the plain intention of the parties.[4] It has, however, been stated, as a general rule, that if the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent.[5] Conditions subsequent are not favored in law, and are construed strictly, for the reason that they tend to destroy estates.[6]

1 2 Blackst. Com. 154.

2 Co. Litt. 201 *a*; 2 Blackst. Com. 154; and see Tompkins *v.* Elliot, 5 Wend. 497; Towle *v.* Palmer, 1 Abb. Pr. N. S. 81; Vanhorne *v.* Dorrance, 3 Dall. 317; Hayden *v.* Stoughton, 5 Pick. 528; Towle *v.* Remsen, 70 N. Y. 303; Cook *v.* Wardens etc. 5 Hun, 293; Hihn *v.* Peck, 30 Cal. 280. A condition precedent, if possible and lawful, must generally be strictly performed: Baltimore etc. R. R. Co. *v.* Polly, 14 Gratt. 447.

3 Hotham *v.* East India Co. 1 Term Rep. 645.

4 Jones *v.* Barkley, 2 Doug. 691; Nicoll *v.* N. Y. etc. R. R. Co. 12 N.

Y. 121; Thorp *v.* Thorp, 12 Mod. 464; Turner *v.* Tebbutt, 2 Younge & C. 225; Houston *v.* Spruance, 4 Har. (Del.) 117; Robbins *v.* Gleason, 47 Me. 259; Gardiner *v.* Corson, 15 Mass. 500; Lowell etc. *v.* Hilton, 11 Gray, 407; Finlay *v.* King, 3 Peters, 374.

5 Finlay *v.* King, 3 Peters, 374; Nicoll *v.* N. Y. etc. R. C. Co. 12 N. Y. 130; Underhill *v.* Saratoga R. R. 20 Barb. 455; and see Rogan *v.* Walker, 1 Wis. 527; Passmore *v.* Moore, 1 Marsh. J. J. 591; Rollins *v.* Riley, 44 N. H. 9; McCullough *v.* Cox, 6 Barb. 386.

6 4 Kent Com. 129; Nicoll *v.* New York etc. R. R. Co. 12 N. Y. 131; Hoopor *v.* Cummings, 45 Me. 359; Bradstreet *v.* Clark, 21 Pick. 389; Sharon Iron Co. *v.* Erie, 41 Pa. St. 341; Gadberry *v.* Sheppard, 27 Miss. 203; Wheeler *v.* Walker, 2 Conn. 200; Wilson *v.* Galt, 18 Ill. 431; Southard *v.* Central R. R. Co. 26 N. J. L. 13.

§ 205. May be annexed to any estate.—A condition may be annexed to any species of estate or interest in real property, whether an estate in fee, in tail, for life, or years, in any lands or tenements.[1]

1 Co. Litt. 201 *a*; 2 Blackst. Com. 152; 1 Greenl. Cruise, 468.

§ 206. When created.—As it respects things *executed*, it has been said that a condition must be created and annexed to the estate at the time of making it;[1] and if a condition is made by a separate deed, it must be sealed and delivered at the same time with the principal deed.[2] But things *executory*, as rents, leases, etc., may be restrained by conditions annexed to them by consent of both parties, after the execution of the instruments of conveyance.[3]

1 1 Greenl. Cruise, 468. A deed with a condition written upon the back, and executed by the grantee, is a conveyance upon condition, if there be nothing in the instrument or condition to the contrary: Barker *v.* Cobb, 36 N. H. 344.

2 Co. Litt. 236 *b*. A deed absolute on its face cannot be avoided by a subsequent condition or defeasance resting upon a parol agreement: Rogers *v.* Sebastian, 21 Ark. 440.

3 Co. Litt. 237 *a*; 1 Greenl. Cruise, 468.

§ 207. Words implying a condition.—Words which imply a condition in a grant may be various, since their operation depends upon the sense which they carry.[1] Land granted to a person "on condition," or "provided always," or "if it shall so happen," or "so that he pay to another a specific sum within a specified time," vests a conditional estate in the grantee.[2] And

the words "to pay" in a will have been considered as constituting a condition.[3]

1 See Bagshaw *v.* Spencer, 1 Ves. Sr. 147; § 198, *ante;* Gibert *v.* Peteler, 38 N. Y. 168. Conditions are not favored by the law, and hence they must be clearly expressed: Craig *v.* Wells, 11 N. Y. 315.

2 Co. Litt. 203 *a*; Wheeler *v.* Walker, 2 Conn. 201.

3 Crickmere *v.* Paterson, Cro. Eliz. 146; and see Wheeler *v.* Walker, 2 Conn. 201.

§ 208. Void conditions.— Conditions which are impossible,[1] or unlawful,[2] or repugnant to the nature of the estate to which they are annexed, are void.[3] But although void, their effect is often materially different, accordingly as they are in their nature precedent or subsequent.[4] Thus a condition precedent being one which must take place before the estate can vest or be enlarged, if it becomes impossible of performance, the estate dependent upon it fails, and the grant or devise becomes wholly void.[5] But when a condition subsequent becomes impossible to be performed, it is the condition itself that becomes void, leaving an absolute estate in the grantee or devisee.[6] A condition annexed to the creation of an estate in fee, that the tenant shall not alienate, is void because repugnant to the estate;[7] and the same principle is applicable to estates for life,[8] or years.[9] A condition restraining the operation of an attachment and levy of an execution is void for the same reason, and also because it is contrary to law that a man's property should not be liable for the payment of his debts.[10] But a condition that the grantee or devisee shall not alienate for a particular time, or to a particular person or persons, is good.[11] And although conditions in restraint of marriage generally are void,[12] yet, if the restraint is only in respect to time, place, or person, such conditions are not utterly to be rejected.[13] A condition in a deed that the grantee shall not use or suffer the premises to be used for the manufacture or sale of intoxicating liquors thereon is valid, and not repugnant to the grant;[14] and so conditions that a

school-house should not be erected on the premises, or a distillery, or a blast-furnace, or a livery stable, or a machine shop for iron manufacture, or a powder magazine, or a hospital, or a cemetery, have been held to be valid.[15]

1 Whitney *v.* Spencer, 4 Cowen, 39; People etc. *v.* Society etc. 1 Paine, 652; Hughes *v.* Edwards, 9 Wheat. 493.

2 Mitchel *v.* Reynolds, 1 P. Wms. 189; Harvey *v.* Aston, 1 Atk. 361.

3 Harvey *v.* Aston, 1 Atk. 361; Canal Bridge *v.* Meth. Soc. 13 Met. 335; Plumb *v.* Tubbs, 41 N. Y. 446; Taylor *v.* Mason, 9 Wheat. 350; Newkirk *v.* Newkirk, 2 Caines, 345; Anderson *v.* Cary, 36 Ohio St. 506; 38 Am. Rep. 602.

4 See Co. Litt. 206; Whitney *v.* Spencer, 4 Cowen, 39; Vanhorne *v.* Dorrance, 2 Dall. 317.

5 Taylor *v.* Mason, 9 Wheat. 350; Mizell *v.* Burnett, 4 Jones (N. C.) 249; Martin *v.* Ballou, 13 Barb. 132; Vanhorne *v.* Dorrance, 2 Dall. 317; Whitney *v.* Spencer, 4 Cowen, 39.

6 Martin *v.* Ballou, 13 Barb. 132; United States *v.* Arredondo, 6 Peters, 745; Barksdale *v.* Elam, 39 Miss. 694; Taylor *v.* Sutton, 15 Ga. 103. Illegal conditions in a grant are simply nugatory, and leave an absolute estate in the grantee: Barksdale *v.* Elam, 39 Miss. 694.

7 Co. Litt. 206; Brandon *v.* Robinson, 18 Ves. 429; Gadberry *v.* Sheppard, 27 Miss. 203; M'Williams *v.* Nisby, 2 Serg. & R. 513; 7 Am. Dec. 654; Doebler's Appeal, 64 Pa. St. 623. Compare Mandlebaum *v.* McDonell, 29 Mich. 78; 18 Am. Rep. 61; De Peyster *v.* Michael, 6 N. Y. 467; Laffan *v.* Naglee, 9 Cal. 676.

8 Rochford *v.* Hackman, 16 Jur. 212; 10 Eng. L. & Eq. 64; McCleary *v.* Ellis, 54 Iowa, 311; 37 Am. Rep. 205.

9 Blackstone Bank *v.* Davis, 21 Pick. 42.

10 Blackstone Bank *v.* Davis, 21 Pick. 42.

11 Co. Litt. 223 *a*; Atwater *v.* Atwater, 18 Beav. 330; Langdon *v.* Ingram, 28 Ind. 360; Smithwick *v.* Jordon, 15 Mass. 113; Blackstone Bank *v.* Davis, 21 Pick. 42.

12 Bertie *v.* Falkland, 2 Freem. Ch. 220; Clarke *v.* Parker, 19 Ves. 1; 1 Story Eq. Jur. § 280. Compare Commonw. *v.* Stauffer, 10 Pa. St. 350; Grace *v.* Webb, 15 Sim. 384; Binnerman *v.* Weaver, 8 Md. 517; Williams *v.* Cowden, 13 Mo. 211.

13 Perrin *v.* Lyon, 9 East, 170; Lloyd *v.* Lloyd, 2 Sim. N. S. 255; 10 Eng. L. & Eq. 139; Shackleford *v.* Hall, 19 Ill. 212; 1 Story Eq. Jur. § 280.

14 Plumb *v.* Tubbs, 41 N. Y. 442; Collins Manuf. Co. *v.* Marcy, 25 Conn. 242; O'Brien *v.* Wetherill, 14 Kan. 616; 9 Am. Dec. 202, n; Cowell *v.* Springs Co. 100 U. S. 55; and see Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35; 13 Am. Rep. 556.

15 Plumb *v.* Tubbs, 41 N. Y. 442; Craig *v.* Wells, 11 N. Y. 315; Collins *v.* Marcy, 25 Conn. 242; and see Stines *v.* Dorman, 25 Ohio St. 580; Warner *v.* Bennett, 31 Conn. 468; French *v.* Old South Soc. 106 Mass. 479. The reservation of a perpetual yearly rent as a condition of the grant of an estate in fee is valid: Van Rensselaer *v.* Barringer, 39 N. Y. 9.

§ 209. Performance of condition.—A distinction is also made between conditions precedent and subse-

quent with regard to their performance.[1] The former, which create an estate, are construed liberally, and are to be performed according to the intent and meaning, although the words of the condition cannot be performed;[2] but the latter, which destroy an estate, are to be construed with great strictness,[3] except in certain special cases.[4] If a condition precedent consists of several parts united by copulatives, the whole must be performed before the estate can arise.[5] As a general rule, any person who has an interest in the condition, or in the estate to which it relates, may perform it;[6] and once performed, it is gone forever.[7] If no time is fixed for the performance of a condition, it must be performed either during the life of the person in whose favor it is reserved, or within a reasonable and convenient time, according to the circumstances of the case;[8] but if such person dies without performing it, the right will not descend to his heir;[9] though it is otherwise where a particular time is appointed for the performance.[10] If a particular place is appointed for the performance of a condition, the party who is to perform must be at that place;[11] and if no place is appointed, and the condition is to pay money, he must seek for the other party if he be within the realm.[12] If the condition is to deliver cumbrous articles, and a place of performance is not designated, the presumed intention is that the delivery may be at any place which the party to whom the condition is to be performed may reasonably appoint.[13]

1 See Ludlow *v.* New York etc. R. R. Co. 443.

2 Co. Litt. 219 *b*; Hogeboom *v.* Hall, 24 Wend. 146; Merrifield *v.* Cobleigh, 4 Cush. 178.

3 Ludlow *v.* New York etc. R. R. Co. 12 Barb. 444; Laberee *v.* Carleton, 53 Me. 211; and see § 198, *ante*.

4 Co. Litt. 219 *b*; 1 Greenl. Cruise, 490.

5 Wood *v.* Southampton, 2 Freem. Ch. 186; Show. P. C. 83; Vanhorne *v.* Dorrance, 2 Dall. 317. See Hasbrook *v.* Paddock, 1 Barb. 635.

6 Simonds *v.* Simonds, 3 Met. 558; Wilson *v.* Wilson, 38 Me. 20; Vermont *v.* Society etc. 2 Paine, 548.

7 1 Greenl. Cruise, 495; and see Dickey *v.* McCullough, 2 Watts & S. 100.

8 Finlay v. King, 3 Peters, 374; Ross v. Tremain, 2 Met. 495; Hamilton v. Elliott, 5 Serg. & R. 375; Hayden v. Stoughton, 5 Pick. 528. Performance may be presumed from lapse of time: Fox v. Phelps, 17 Wend. 393.

9 1 Greenl. Cruise, 493.

10 Marks v. Marks, 1 Abr. Ca. Eq. 106.

11 1 Rolle Abr. 444; 1 Greenl. Cruise, 493.

12 Co. Litt. 210 *b*; 1 Greenl. Cruise, 493.

13 1 Rolle Abr. 444. See Aldrich v. Albee, 1 Me. 120; Lamb v. Lathrop, 13 Wend. 95.

§ 210. Who bound by condition.—One who accepts an estate upon condition is bound to the performance of the condition, although such performance be attended with a loss.[1] And one not having the capacity to incur a mere personal obligation, as an infant or married woman, will be bound to perform a condition, because it does not charge the person, but the land.[2] And a condition annexed to the estate, as a part of the tenure, binds the estate into whose hands soever it may pass.[3]

1 Att.-Gen. v. Andrews, 3 Ves. 633; Att.-Gen. v. Christ's Hospital, 3 Bro. C. C. 165; Rowell v. Jewett, 71 Me. 408.

2 1 Greenl. Cruise, 495; Cross v. Carson, 8 Blackf. 138; Garrett v. Scontew, 3 Denio, 340; and see Parker v. Lincoln, 12 Mass. 18; Fonda v. Sage, 46 Barb. 109.

3 Hogsboom v. Hall, 24 Wend. 146; Pickering v. Pickering, 15 N. H. 281; Wilson v. Wilson, 38 Me. 18; Taylor v. Sutton, 15 Ga. 103.

§ 211. When condition is excused or waived.—Various circumstances may operate to excuse the nonperformance of a condition; as where performance becomes impossible by the act of God,[1] or is prohibited by law,[2] or the party to be benefited by the condition refuses to accept performance.[3] So performance may be waived by the party who is to have the benefit of a condition,[4] and acts which are inconsistent with the claim of forfeiture are held to be sufficient evidence of such waiver;[5] though it is otherwise as to a mere silent acquiescence.[6]

1 Vanhorne v. Dorrance, 2 Dall. 317; Merrill v. Emery, 10 Pick. 507; and see Laughter's Case, 5 Rep. 21; § 204, *ante*.

2 Anglesea v. Church Wardens, 6 Q. B. 114.

3 Co. Litt. 206; Jackson v. Crafts, 18 Johns. 110; 1 Greenl. Cruise, 498. Or has rendered performance impossible or unnecessary: Jones v. Chesapeake etc. R. R. Co. 14 W. Va. 514; Cape Fear etc. Co. v. Wilcox, 7 Jones (N. C.) 481.

4 Bailey v. Homan, 3 Bing. N. C. 915; Enfield Co. v. Conn. River Co. 7 Conn. 45; Farley v. Farley, 14 Ind. 331.

5 Andrews v. Senter, 32 Me. 394.

6 Jackson v. Crysler, 1 Johns. Cas. 123; Moorefield v. Cobleigh, 4 Cush. 184. See Ludlow v. N. Y. etc. R. R. 12 Barb. 440.

§ 212. Enforcement of condition.—Upon breach of a condition, the party who has a right to enforce it becomes entitled to the estate to which the condition was annexed;[1] but he may decline to take advantage of the breach, and if so, the estate is not defeated.[2] At common law, the only mode by which advantage could be taken of the breach of a condition was by entry;[3] and as conditions subsequent can only be reserved for the benefit of the grantor and his heirs, no others can by entering take advantage of a breach of them.[4] But the assignee of a lessor may take advantage of the breach of an implied condition.[5] It is universally true that a stranger cannot avail himself of a condition.[6]

1 1 Greenl. Cruise, 504; and see Fisk v. Chandler, 30 Me. 79. A breach of condition forfeits the estate: Woodruff v. Water Power Co. 10 N. J. Eq. 489.

2 Atkins v. Chilson, 9 Met. 62; Tallman v. Snow, 35 Me. 342; Phelps v. Chesson, 12 Ired. 134; Webster v. Cooper, 14 How. 501.

3 Co. Litt. 218 *a*; Nicoll v. New York etc. R. R. Co. 12 N. Y. 131; Tallman v. Snow, 35 Me. 342; Sperry v. Sperry, 8 N. H. 477; Chalker v. Chalker, 1 Conn. 79. Compare Hamilton v. Elliott, 5 Serg. & R. 375; Andrews v. Senter, 32 Me. 394; Austin v. Cambridgeport Parish, 21 Pick. 215.

4 Nicoll v. New York etc. R. R. Co. 12 N. Y. 131; Gray v. Blanchard, 8 Pick. 284; and see Cross v. Carson, 8 Blackf. 138; Hooper v. Cummings, 45 Me. 359; Jackson v. Topping, 1 Wend. 388. Where the grantor or his heirs are in possession of the land, upon breach of condition subsequent the estate will revest in them at once, without any formal act on their part: Adams v. Ore Knob Copper Co. 12 Reporter, (C. C.) 166.

5 Co. Litt. 215 *a*.

6 Buckalew v. Estell, 5 Cal. 103; Smith v. Brannan, 13 Cal. 107; Dewey v. Williams, 40 N. H. 222; Norris v. Milner, 20 Ga. 563; Boyer v. Tressler, 18 Ind. 260.

§ 213. Relief on breach of condition.—Equity will in some cases interpose relief where a forfeiture has

been incurred at law, even in favor of the heir of the party who was to have performed the condition.[1] But such relief is restricted to cases where compensation can be made in damages, and the grantor placed in the same situation as if the occurrence had not happened;[2] as where a lessee neglects to pay his rent at the time specified in his lease, and a right of re-entry to avoid the lease accrues to the lessor.[3] If the nature of the case be such as to afford no rule for the assessment of damages by way of compensation, equity will not relieve;[4] as, for instance, where the forfeiture is incurred by the tenant's aliening or assigning a term,[5] or by his neglecting to repair[6] or insure the premises,[7] or by exercising a forbidden trade thereon,[8] and the like.[9]

1 Hayward *v.* Angel, 1 Vern. 222; Popham *v.* Bampfeld, 1 Vern. 83; Bethlehem *v.* Annis, 40 N. H. 34; Luckett *v.* White, 10 Gill & J. 480; City Bank *v.* Smith, 3 Gill & J. 265; Bacon *v.* Huntington, 14 Conn. 92.

2 Woodman *v.* Blake, 2 Vern. 222; Henry *v.* Tupper, 29 Vt. 358; Walker *v.* Wheeler, 2 Conn. 299; Stone *v.* Ellis, 9 Cush. 95; Dunklee *v.* Adams, 20 Vt. 415; Carpenter *v.* Westcott, 4 R. I. 225.

3 Smith *v.* Parks, 10 Mod. 333; Hill *v.* Barclay, 16 Ves. 405; 18 Ves. 56; Atkins *v.* Chilson, 11 Met. 112. See Hancock *v.* Carlton, 6 Gray, 52.

4 Descarlett *v.* Dennett, 9 Mod. 22; Elliott *v.* Turner, 13 Sim. 485.

5 Hill *v.* Barclay, 18 Ves. 56; Wafer *v.* Mocato, 9 Mod. 112.

6 Hill *v.* Barclay, 18 Ves. 56.

7 Rolfe *v.* Harris, 2 Price, 206, n.; Green *v.* Bridges, 4 Sim. 96.

8 Macher *v.* Foundling Hospital, 1 Ves. & B. 188. See § 208, *ante*.

9 See Descarlett *v.* Dennett, 9 Mod. 22; Lovat *v.* Lord Ranclagh, 3 Ves. & B. 24; Wadman *v.* Calcraft, 10 Ves. 67.

§ 214. Conditional limitation.—A distinction is made in law between a condition and a conditional limitation.[1] The former determines an estate after breach, upon entry or claim by the grantor or his heirs;[2] the latter marks the period which determines the estate, without any act on the part of him who has the next expectant estate.[3] An estate on condition leaves in the grantor a vested right, which, by its very nature, is reserved to him as a present existing interest, transmissible to his heirs;[4] while a limitation passes the whole interest of the grantor at once, and creates an estate to

arise and vest in a third person upon a contingency, at a future and uncertain period of time.[5] As a general rule, if there be express words of condition annexed to the estate, it cannot be construed a limitation;[6] but there are exceptions to this rule, and it is held that although the words be proper to create a condition, yet, if upon the non-performance thereof the estate be limited over to another person, this shall be a limitation.[7] Under the general head of conditional limitation may be included every limitation which is to vest an interest in a third person on condition, or upon an event which may or may not happen.[8]

1 See 2 Blackst. Com. 155; 1 Greenl. Cruise, 511.

2 § 212, *ante*; Bowen *v.* Bowen, 18 Conn. 535.

3 Proprietors etc. *v.* Grant, 3 Gray, 147; Ashley *v.* Warner, 11 Gray 43; Coppage *v.* Alexander, 2 Mon. B. 316; Portington's Case, 10 Rep. 42

4 Proprietors etc. *v.* Grant, 3 Gray, 147. Compare Cornelius *v* Ivins, 26 N. J. L. 386; Nicoll *v.* N. Y. etc. R. R. Co. 12 N. Y. 139; Hooper *v.* Cummings, 45 Me. 359.

5 Proprietors etc. *v.* Grant, 3 Gray, 147; Portington's Case, 10 Rep 42; and see Mayor etc. *v.* Stuyvesant, 17 N. Y. 34.

6 Portington's Case, 10 Rep. 42.

7 Fry's Case, 1 Vent. 203; and see Wellock *v.* Hammond. Cro. Eliz 204; Stearns *v.* Godfrey, 16 Me. 160; Fifty Associates *v.* Howland, 11 Met. 103.

8 Proprietors etc. *v.* Grant, 3 Gray, 149.

CHAPTER XXI.

MORTGAGE.

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§ 215. Definition and nature of.—It is said to be dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other in any other terms than those very words.[1] A mortgage at common law is, however, described to be an estate created by a conveyance, absolute in form, but designed as a pledge or security for the payment of money or the performance of some other act, and to become void upon such payment being made or act performed, agreeably to the terms prescribed at the time of the conveyance.[2] It is in substance but a security for a debt or an obligation to which it is collateral.[3] The one who gives a mortgage is called the mortgagor, and the one who takes, the mortgagee.[4] Until condition broken, the mortgagee is deemed to be seized of a defeasible estate;[5] but upon failure by the mortgagor to perform the condition at the time appointed, the estate effectually vests at law in the mortgagee, though subject in equity to the right of redemption.[6] In many of the States, however, a mortgage is now regarded, both at law and in equity, as merely a lien upon the property;[7] the debt or obligation is considered as the principal thing, and the mortgage as only the incident.[8]

1 Lord Denman, in Doe v. Barton, 11 Ad. & E. 314.

2 See 1 Wash. Real Prop. 475; 4 Kent Com. 133; Wms. Real Prop. 349; 1 Greenl. Cruise, 548; Mitchell v. Burnham, 44 Me. 286; Moore v. Esty, 5 N. H. 469; Dexter v. Harris, 2 Mason, 531; Baker v. Thrasher, 4 Denio, 495; Carter v. Taylor, 3 Head, 30; Cross v. Robinson, 21 Conn. 387; Welsh v. Phillips, 54 Ala. 309; Trimm v. Marsh, 54 N. Y. 599; 13 Am. Rep. 623.

3 Brobst v. Brock, 10 Wall. 529; Heburn v. Warner, 112 Mass. 273. A mortgage is but an incident of the debt: Blackwell v. Barnett, 52 Tex. 326.

4 See Brigham v. Winchester, 1 Met. 390; Cooper v. Whitney, 3 Hill, 95; Austin v. Downer, 25 Vt. 558.

5 Lund v. Lund, 1 N. H. 39; Fay v. Cheney, 14 Pick. 399; Middletown Sav. Bank v. Bates, 11 Conn. 523; Conard v. Atlantic Ins. Co. 1 Peters, 386; Hancock v. Carlton, 6 Gray, 39.

6 Fay v. Cheney, 14 Pick. 399; Waterman v. Matteson, 4 R. I. 545; Breese v. Bange, 2 Smith, E. D. 436; Johnson v. Watson, 87 Ill. 535; Hagar v. Brainerd, 44 Vt. 294; Hemphill v. Ross, 63 N. C. 477; Wood v. Trask, 7 Wis. 566; Shields v. Lozear, 34 N. J. L. 496.

7 See Kidd v. Teeple, 23 Cal. 255; Trimm v. Marsh, 54 N. Y. 599; Roberts v. Sutherlin, 4 Oreg. 219; Elfe v. Cole, 26 Ga. 197; Vason v. Ball, 53 Ga. 268; Berthold v. Fox, 13 Minn. 501; Hurley v. Estes, 6 Neb. 386; Woolley v. Holt, 14 Bush, 788.

8 McMillan v. Richards, 9 Cal. 365; Glass v. Ellison, 9 N. H. 69; Timms v. Shannon, 19 Md. 296. Compare Hubbell v. Moulson, 53 N. Y. 225; Blackwell v. Barnett, 52 Tex. 326.

§ 216. Meaning of term.—The nature of the estate created by a mortgage is said to be implied in the name itself, being the French translation of the Latin *mortium vadium*, that is, dormant or dead pledge.[1] It is called mortgage (dead pledge), because it is doubtful whether the grantor will perform at the day limited, and if he does not, then the land which is put in pledge upon condition is taken from him forever, and so dead to him upon condition;[2] and also to distinguish it from that which was called *vivum vadium*, or living pledge.[3] The latter was a conveyance of lands by a debtor to his creditor, to hold until the rents and profits should amount to the sum borrowed, and then to revert to the borrower.[4] It was in use in the early periods of the English law, but has been superseded by the *mortium vadium*, or common-law mortgage.[5] Another kind of pledge in early use, but now obsolete, was called a Welsh mortgage, where the mortgagee entered and received the rents in satisfaction of the interest upon the sum loaned, the principal generally remaining undisturbed.[6]

1 See 1 Greenl. Cruise, 545; 1 Wash. Real Prop. 476; 2 Blackst. Com. 157; Breese *v.* Bange, 2 Smith, E. D. 486.

2 Litt. § 332.

3 Co. Litt. 205 *a*; Breese *v.* Bange, 2 Smith, E. D. 487.

4 See 2 Blackst. Com. 157; Howell *v.* Price, 1 P. Wms. 291; Livingston *v.* Story, 11 Peters, 388.

5 4 Kent Com. 137; 1 Wash. Real Prop. 476.

6 1 Greenl. Cruise, 553; Angier *v.* Masterson, 6 Cal. 61; Rankert *v.* Clow, 16 Tex. 9.

§ 217. Who entitled to possession.—At common law, in the absence of any agreement between the parties as to the possession of the premises, the mortgagee is entitled to enter immediately upon the execution of the mortgage, and hold the estate until the condition is performed.[1] But in those States where a mortgage is considered a security only, and as not passing the legal title to the mortgagee,[2] he is not entitled to possession until foreclosure, unless the right of possession is given by express stipulation.[3]

1 Vance *v.* Johnson, 10 Humph. 214; Jamieson *v.* Bruce, 6 Gill & J. 72; 26 Am. Dec. 557; Terry *v.* Rossell, 32 Ark. 478; Stewart *v.* Barrow, 7 Bush, 368; Annapolis etc. R. R. Co. *v.* Gantt, 39 Md. 115; Jackson *v.* Warren, 32 Ill. 331; Tryon *v.* Munson, 77 Pa. St. 250.

2 See § 215, *ante*; Morton *v.* Noble, 22 Ind. 160; Wagar *v.* Stone, 36 Mich. 364.

3 Besser *v.* Hawthorne, 3 Oreg. 129; Drake *v.* Root, 2 Col. 685; Walker *v.* Johnson, 37 Tex. 129; Chick *v.* Willetts, 2 Kan. 384; Courtney *v.* Carr, 6 Iowa, 239; Skinner *v.* Buck, 29 Cal. 253; Berthold *v.* Fox, 13 Minn. 501; and see Waring *v.* Smyth, 2 Barb. Ch. 135; Nixon *v.* Bynum, 1 Bail. 148.

§ 218. Equity of redemption.—By the strictness of the ancient common law, an estate mortgaged was absolutely forfeited and lost if the condition was not really and *bona fide* performed.[1] But this doctrine being deemed contrary to the principles of justice, the court of chancery interposed, and resolved that a condition of this kind was in the nature of a penalty which ought to be relieved against;[2] and accordingly established it as a rule, that although the condition was not strictly performed by which the estate was forfeited at law, yet the mortgagor might in equity be allowed still to reclaim it upon pay-

ment of his debt with interest within a reasonable time.[3] This right to reclaim or redeem a mortgaged estate, after breach of the condition, is called an "equity of redemption";[4] and it is a necessary incident to every mortgage.[5] Mortgages at the present day are therefore possessed of a twofold nature, the one created by and known to the common law, the other created by and known only to equity.[6] In a court of common law a mortgage is an estate, while in a court of equity it is regarded as a mere security for a debt or obligation.[7]

1 Goodall's Case, 5 Rep. 95; Wade's Case, 5 Rep. 115; 1 Spence Eq. Jur. 601; Parsons v. Welles, 17 Mass. 421; 1 Greenl. Cruise, 546; Lansing v. Goelet, 9 Cowen, 401.

2 See 1 Spence Eq. Jur. 603; Story Eq. Jur. § 1005; Willett v. Winnell, 1 Vern. 488.

3 1 Greenl. Cruise, 546, 547; 4 Kent Com. 158; How v. Vigures, 1 Rep. in Ch. 32; Bowen v. Edwards, 1 Rep. in Ch. 222; and see Shields v. Lozear, 34 N. J. L. 496.

4 Emanuel College, v. Evans, 1 Rep. in Ch. 10; 4 Kent Com. 158; 1 Greenl. Cruise, 547; Parsons v. Welles, 17 Mass. 421; Clapp v. Titus, 9 Vt. 211; Norwich v. Hubbard, 22 Conn. 587.

5 Newcomb v. Bonham, 1 Vern. 7; Holridge v. Gillespie, 2 Johns. Ch. 34; Plato v. Roe, 14 Wis. 453; Lee v. Evans, 8 Cal. 424; Pritchard v. Elton, 38 Conn. 434; Batty v. Snook, 5 Mich. 231; Johnston v. Gray, 16 Serg. & R. 361; 16 Am. Dec. 577; Wilmerding v. Mitchell, 42 N. J. L. 476.

6 See Wms. Real Prop. 353; 1 Wash. Real Prop. 478.

7 Jackson v. Willard, 4 Johns. 41; Timms v. Shannon, 19 Md. 296; Brobst v. Brock, 10 Wall. 519; Glass v. Ellison, 9 N. H. 69; Ledyard v. Butler, 9 Paige, 132; White v. Rittenmyer, 30 Iowa, 268.

§ 219. Who may make.—Any person having the legal capacity to act for himself, and who has an interest in the land at the time of the transaction,[1] may make a mortgage, or employ another to do so in his behalf.[2] A mortgage given by an infant is voidable only, and not void,[3] and may be ratified by him on his coming of age.[4] So a mortgage given by a person of weak intellect is valid, provided it was not procured through any undue advantage taken of the mortgagor's weakness.[5] At common law, a married woman could not make a mortgage;[6] but in England her separate property is held liable in equity for her debts and engagements, whether in writing or not,[7] and this doctrine has been adopted in some

of the States.[8] In many of the States the wife's capacity to make contracts has been enlarged by statutes, the provisions of which enable her to bind herself and her property as if she were a *feme sole*.[9] A corporation may, through its agents,[10] execute a mortgage upon the corporate property, unless the power is expressly denied, or its exercise is inconsistent with the public obligations of the corporation.[11] Power is sometimes conferred by statute upon guardians and persons acting in a representative capacity to mortgage the real estate of their wards, etc.;[12] but the power in such cases must be strictly exercised in accordance with the requirements of the statute.[13]

1 Payne *v.* Patterson, 77 Pa. St. 134.

2 See Page *v.* Cooper, 16 Beav. 396; Zane *v.* Kennedy, 73 Pa. St. 182; Contant *v.* Servoss, 3 Barb. 128; Campbell *v.* Tompkins, 32 N. J. Eq. 170.

3 Loomer *v.* Wheelwright, 3 Sand. Ch. 135; Harner *v.* Dipple, 31 Ohio St. 72; 27 Am. Rep. 496; Allen *v.* Poole, 54 Miss. 323; Roberts *v.* Wiggin, 1 N. H. 73; 8 Am. Dec. 38; Calls *v.* Day, 38 Wis. 643; Flynn *v.* Powers, 36 How. Pr. 289. But a mortgage made by an infant *feme covert* to secure the debt of her husband is absolutely void: Chandler *v.* McKinney, 6 Mich. 217.

4 Dana *v.* Coombs, 6 Me. 89; Allen *v.* Poole, 54 Miss. 323; Bigelow *v.* Kinney, 3 Vt. 353; Palmer *v.* Miller, 25 Barb. 399; Keegan *v.* Cox, 116 Mass. 289; Davis *v.* Dudley, 70 Me. 236; 35 Am. Rep. 318; Gillespie *v.* Bailey, 12 W. Va. 70; 29 Am. Rep. 445.

5 Marmon *v.* Marmon, 47 Iowa, 121; Day *v.* Seely, 17 Vt. 542; Van Horn *v.* Keenan, 28 Ill. 445.

6 See Martin *v.* Dwelly, 6 Wend. 9; 21 Am. Dec. 245; Breckenridge *v.* Ormsby, 1 Marsh. J. J. 236; 19 Am. Dec. 71; Savage *v.* Holyoke, 59 Me. 365.

7 Hulme *v.* Tenant, 1 Bro. C. C. 16; Stead *v.* Nelson, 2 Beav. 245; Peacock *v.* Monk, 2 Ves. Sr. 190; Murray *v.* Barlee, 3 Myne & K. 209; Shattock *v.* Shattock, Law R. 2 Eq. 182; Matthewman's Case, Law R. 3 Eq. 781; Pride *v.* Bubb, Law R. 7 Ch. 64.

8 See Deering *v.* Boyle, 8 Kan. 525; Jaques *v.* M. E. Church, 17 Johns. 548; 8 Am. Dec. 447; Todd *v.* Lee, 15 Wis. 365; Hobson *v.* Hobson, 8 Bush, 665; Webb *v.* Hoselton, 4 Neb. 308; Elliott *v.* Gower, 12 R. I. 79; 34 Am. Rep. 600; Johnson *v.* Cummins, 16 N. J. Eq. 97; Smith *v.* Thompson, 2 McAr. 291; 29 Am. Rep. 621; Willard *v.* Eastham, 15 Gray, 328.

9 See Wilson *v.* Herbert, 41 N. J. L. 454; 32 Am. Rep. 243; Kroushop *v.* Shontz, 51 Wis. 204; 37 Am. Rep. 817; Northw. Mut. Life Ins. Co. *v.* Allis, 23 Minn. 337; Layman *v.* Shultz, 60 Ind. 541; Short *v.* Battle, 52 Ala. 456; Nourse *v.* Henshaw, 123 Mass. 96; Corn Exchange Ins. Co. *v.* Babcock, 42 N. Y. 613; Moore *v.* Fuller, 6 Oreg. 272. A voluntary mortgage by a wife of her lands to secure her husband's debt is valid: Campbell *v.* Tompkins, 32 N. J. Eq. 170; Heburn *v.* Warner, 112 Mass. 271; Hall *v.* Tay, 131 Mass. 192.

10 Boone Corp. § 54; Holbrook v. Chamberlin, 116 Mass. 155.
11 Boone Corp. §§ 40, 177, 275.
12 See Edwards v. Taliafero, 34 Mich. 13; Black v. Dressell, 20 Kan. 153.
13 Edwards v. Taliafero, 34 Mich. 13.

§ 220. Who may take.—Any one who has the capacity to hold real estate may, of course, take a mortgage;[1] and an infant or a married woman may at common law be a mortgagee.[2] So a corporation may be a mortgagee;[3] and even an alien is capable of holding and enforcing a mortgage.[4]

1 See Appleton v. Boyd, 7 Mass. 131; Fay v. Cheney, 14 Mass. 399.
2 Parker v. Lincoln, 12 Mass. 16; and see Tucker v. Fenno, 110 Mass. 311; Boston Bank v. Chamberlin, 15 Mass. 220.
3 Boone Corp. § 182.
4 Hughes v. Edwards, 9 Wheat. 489.

§ 221. What may be mortgaged.—Every kind of interest in the land itself which is capable of being transferred may be mortgaged.[1] Rights in remainder and reversion,[2] a contingent interest, or a possibility coupled with an interest,[3] may, therefore, be the subject of a mortgage.[4] The interest of a mortgagee may itself be mortgaged.[5] So the obligee of a bond for title has an interest which he may mortgage.[6] And land held by right of pre-emption is the subject of mortgage,[7] though the right of pre-emption itself is not.[8] And a mere possibility or expectancy of acquiring property, without a present interest in it, is not a subject of mortgage.[9] At common law, a man cannot grant or charge that which he has not at the time of the transaction.[10] But the rule is otherwise in equity,[11] and courts of equity will sustain assignments of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them.[12] Thus a mortgage of a growing crop,[13] or of a crop to be raised, the seed of which has not

been planted,[14] is held to be valid.[15] And where a mortgage is made by a railroad company to secure bonds, and the mortgage declares that it shall include all present and future acquired property, as soon as the property is acquired the mortgage operates upon it.[16] The mortgage of a building will, in general, carry with it the land on which it stands, and which is essential to its use.[17] And a mortgage of the land will cover such articles as are essential to the use of the realty, and without which, or similar articles, the realty would cease to be of value.[18] A building erected upon the lands after the giving of the mortgage is subject to the lien thereof;[19] but a building severed and removed from mortgaged lands, of which lands it formed a part when the mortgage was given, is held to be disencumbered of the lien.[20]

1 Cal. Civ. Code, § 2947; Miller v. Tipton, 6 Blackf. 238; Bull v. Sykes, 7 Wis. 449; Dorsey v. Hall, 7 Neb. 460; Hagar v. Brainerd, 44 Vt. 294; Neligh v. Mechenor, 11 N. J. Eq. 539.

2 Curtis v. Root, 20 Ill. 522; McGuire v. Van Pelt, 55 Ala. 344.

3 Wilson v. Wilson, 32 Barb. 328.

4 Neligh v. Mechenor, 11 N. J. Eq. 539; Hosmer v. Carter, 68 Ill. 98; Massey v. Papin, 24 How. 362; Van Rensselaer v. Dennison, 35 N. Y. 393; Lanfair v. Lanfair, 18 Pick. 304.

5 Henry v. Davis, 7 Johns. Ch. 40; Cutts v. York Manuf. Co. 18 Me. 190; Graydon v. Church, 7 Mich. 59; Murdock v. Chapman, 9 Gray, 156.

6 Baker v. Bishop etc. 45 Ill. 264.

7 Whitney v. Buckman, 13 Cal. 536.

8 Gilbert v. Penn, 12 La. An. 235.

9 Baylee v. Commonw. 40 Pa. St. 37; and see Low v. Pew, 108 Mass. 347; 11 Am. Rep. 357; Skipper v. Stokes, 42 Ala. 255.

10 Payne v. Patterson, 77 Pa. St. 134; Barnard v. Eaton, 2 Cush. 295; Ross v. Wilson, 7 Bush, 29; Booker v. Jones, 55 Ala. 266; Looker v. Peckwell, 38 N. J. L. 253; Pierce v. Emery, 32 N. H. 484; Parker v. Jacobs, 14 S. C. 112; 37 Am. Rep. 724.

11 See Field v. Mayor etc. 6 N. Y. 179; Mitchell v. Winslow, 2 Story, 630; Langton v. Horton, 1 Hare, 549.

12 Stover v. Eycleshimer, 3 Keyes, 620; Mitchell v. Winslow, 2 Story, 630; Seymour v. Canandaigua etc. R. R. Co. 25 Barb. 284; and see Frazer v. Hilliard, 2 Strob. 309; McCaffrey v. Woodin, 65 N. Y. 459; 22 Am. Rep. 644; Williams v. Briggs, 11 R. I. 476; 23 Am. Rep. 513.

13 Catten v. Willoughby, 83 N. C. 75; 35 Am. Rep. 564; and see Lehman v. Marshall, 47 Ala. 363; McGee v. Fitzer, 37 Tex. 27.

14 Moore v. Byrum, 10 S. C. 452; 30 Am. Rep. 58; Wyatt v. Watkins, 16 Alb. L. J. 205; 30 Am. Rep. 63; Sellers v. Lester, 48 Miss. 513; Everman v. Robb, 52 Miss. 653; Shexart v. Taylor, 7 How. Pr. 251.

15 See Apperson v. Moore, 30 Ark. 54; 21 Am. Rep. 170; Arques v.

Wasson, 51 Cal. 630; 21 Am. Rep. 718; Ellett v. Butt, 1 Woods, 214; 19 Wall. 544; Bryant v. Pennell, 61 Me. 108. But compare Hutchinson v. Ford, 9 Bush, 318; 15 Am. Rep. 711.

16 Benjamin v. Elmira etc. R. R. Co. 49 Barb. 441; 34 N. Y. 675; Pierce v. Milwaukee etc. R. R. Co. 24 Wis. 551; 1 Am. Rep. 203; Phila. etc. R. R. Co. v. Woelper, 64 Pa. St. 366; 3 Am. Rep. 536; Pullan v. Cin. etc. R. R. Co. 4 Biss. 35; Galveston R. R. Co. v. Cowdrey, 11 Wall. 481.

17 Greenwood v. Murdock, 9 Gray, 20; Wilson v. Hunter, 14 Wis. 83.

18 Bond v. Coke, 71 N. C. 97; Hoyle v. Plattsburgh etc. R. R. Co. 51 Barb. 45; and see Johnston v. Morrow, 60 Mo. 339; Union Co. v. Murphy Co. 22 Cal. 620; Meux v. Jacobs, Law R. 7 H. L. Cas. 481; 13 Eng. Rep. 14; In re McManus, Law R. 10 Ch. 1; 12 Eng. Rep. 743; Allen v. Woodard, 125 Mass. 400; 28 Am. Rep. 250. Hop-poles upon a farm are covered by a mortgage of the land: Sullivan v. Toole, 28 Hun, 203. Until they are severed, the crops growing on mortgaged land are covered by the mortgage, whether planted before or after its execution: Rankin v. Kinsey, 7 Ill. App. 215.

19 Buckout v. Swift, 27 Cal. 433; and see Milton v. Colby, 5 Met. 78.

20 Buckout v. Swift, 27 Cal. 433; and see Hill v. Gwin, 51 Cal. 47; Gardner v. Finley, 19 Barb. 317. But compare Hamlin v. Parsons, 12 Minn. 108; Hutchins v. King, 1 Wall. 59.

§ 222. Form and requisites of.—A statutory form of mortgage is provided in some of the States,[1] but no particular form is necessary to be followed in order to constitute a mortgage.[2] Sealing is an essential formality to the execution of a mortgage at common law;[3] and in many of the States it must be witnessed and acknowledged in order to be admitted to record.[4] So there is no mortgage without a delivery thereof,[5] and it must also be accepted by the mortgagee.[6] The terms upon which the conveyance may be defeated are usually inserted in the deed, and this is the preferable mode;[7] it is, however, sufficient if it be done in a separate instrument of defeasance,[8] which, at common law, should be of as high a nature as the deed itself which is to be defeated.[9] The two deeds must be delivered contemporaneously, but they need not bear the same date.[10] The date is no part of the substance of a mortgage, and may be contradicted.[11] The description of the land sought to be mortgaged must be definite and certain, or the mortgage will be invalid.[12] A description by reference to other deeds is, however, sufficient.[13] A formal description of the debt, to secure the payment of which the mortgage is given, is not essen-

tial;[14] but a mortgage which contains no covenant or promise to pay the money secured by it, nor any express acknowledgment of indebtedness by the mortgagor, creates no personal liability.[15]

1 See Cal. Civ. Code, § 2948; Porter v. Muller, 53 Cal. 677.

2 De Leon v. Higuera, 15 Cal. 483; Mason v. Moody, 26 Miss. 184; Cotterell v. Long, 20 Ohio, 464; Burnside v. Terry, 45 Ga. 621.

3 Hebron v. Centre Harbor, 11 N. H. 571; Erwin v. Shuey, 8 Ohio St. 510; In re St. Helen Mill Co. 3 Sawy. 88; Racouillat v. Rene, 32 Cal. 450. See Woods v. Wallace, 22 Pa. St. 171. Signing is, of course, one of the requisites of a mortgage: Goodman v. Randall, 44 Conn. 221; Freeman v. Peay, 23 Ark. 439. But the mortgagor's signature, made by another in his presence and by his direction, is sufficient: Fouch v. Wilson, 59 Ind. 93.

4 See Sanborn v. Robinson, 54 N. H. 239; Ross v. Worthington, 11 Minn. 438; Harper v. Barsh, 10 Rich. Eq. 149; Moore v. Thomas, 1 Oreg. 201; Van Thornily v. Peters, 26 Ohio St. 471; Gardner v. Moore, 51 Ga. 268; Jones v. Berkshire, 15 Iowa, 248; Jacoway v. Gault, 20 Ark. 190; Frost v. Beekman, 1 Johns. Ch. 288; Todd v. Outlaw, 79 N. C. 235.

5 Freeman v. Peay, 23 Ark. 439; Croft v. Bunster, 9 Wis. 503; Bell v. Farmer's Bank, 11 Bush, 34; 21 Am. Rep. 205; Tisher v. Beckwith, 30 Wis. 55; 11 Am. Rep. 546.

6 Freeman v. Peay, 23 Ark. 439; Evans v. White, 53 Ind. 1.

7 See Baker v. Wind, 1 Ves. 160; Elliott v. Wood, 53 Barb. 285; Whitney v. French, 25 Vt. 663.

8 Perkins v. Dibble, 10 Ohio, 33; Archambau v. Green, 21 Minn. 520; Corpman v. Baccastow, 84 Pa. St. 363; Edrington v. Harper, 3 Marsh. J. J. 353; 20 Am. Dec. 145; Scott v. Henry, 8 Eng. (Ark.) 112; Baxter v. Dear, 24 Tex. 17; Warren v. Lovis, 53 Me. 463; Ogden v. Grant, 6 Dana, 473; and see Odell v. Montross, 68 N. Y. 499; Lanahan v. Sears, 102 U. S. 318; Clement v. Bennett, 70 Me. 207.

9 Eaton v. Green, 22 Pick. 526; Richardson v. Woodbury, 43 Me. 206; Warren v. Lovis, 53 Me. 463; Watson v. Dickens, 12 Smedes & M. 608; Kelly v. Thompson, 7 Watts, 401; and see Guthrie v. Kahle, 46 Pa. St. 331.

10 Scott v. McFarland, 13 Mass. 309; Haines v. Thomson, 70 Pa. St. 434; Hale v. Jewell, 7 Me. 435; Cotton v. McKee, 68 Me. 486; Bryan v. Cowart, 21 Ala. 92; Baptist Society v. Clapp, 18 Barb. 36; Harrison v. Phillips' Academy, 12 Mass. 456.

11 Lyon v. McIlvaine, 24 Iowa, 9; Holt v. Russell, 56 N. H. 559.

12 Cochran v. Utt, 42 Ind. 267; Nolte v. Libbert, 34 Ind. 163; Peck v. Mallams, 10 N. Y. 505; Boyd v. Ellis, 11 Iowa, 97; Kelffer v. Starn, 27 La. An. 282.

13 Slater v. Breese, 36 Mich. 77; Robinson v. Brennan, 115 Mass. 532.

14 Gilman v. Moody, 43 N. H. 239; Seymour v. Darrow, 31 Vt. 122; Rice v. Rice, 4 Pick. 349; Ricketson v. Richardson, 19 Cal. 330; Paine v. Benton, 32 Wis. 491.

15 Coleman v. Van Rensselaer, 44 How. Pr. 368; Weed v. Covill, 14 Barb. 242.

§ 223. Indebtedness secured by.—In order to render a mortgage valid against a creditor or a purchaser for

a valuable consideration, it should, so far as is reasonably practicable, set out the amount of the debt for the payment of which the parties intend it as a security.[1] Though, if the amount of the debt may be ascertained by reference to some other instrument, as a note or bond, this has generally been held sufficient to put subsequent purchasers upon inquiry;[2] and the amount of the note need not be specified in the mortgage if it is otherwise sufficiently described.[3] A mortgage made to secure an unliquidated debt is good,[4] and so of a mortgage to secure future advances if it be in other respects valid.[5] But where it is optional with the mortgagee to make the advances or not, and he has actual notice of a later mortgage upon the same property for an existing debt or liability, such later mortgage will take precedence of the prior one as to all advances made after notice of such later mortgage.[6] And a mortgage given in bad faith for a greater sum than is due, to secure both a present indebtedness and future advances as a pretended security, is invalid.[7] A mortgage is security only for the debt thereby secured, and cannot be held for other debts of the mortgagor, even as against him.[8]

1 Pearce *v.* Hall, 12 Bush, 209; Hart *v.* Chalker, 14 Conn. 77; and see Booth *v.* Barnum, 9 Conn. 290; Metrop. Bank *v.* Godfrey, 23 Ill. 604.

2 Pike *v.* Collins, 33 Me. 38; and compare Doyle *v.* White, 26 Me. 341; Michigan Ins. Co. *v.* Brown, 11 Mich. 265; Hurd *v.* Robinson, 11 Ohio St. 242.

3 Somersworth Bank *v.* Roberts, 38 N. H. 22; and see Follett *v.* Heath, 15 Wis. 601; Partridge *v.* Swazey, 45 Me. 414; Hough *v.* Bailey, 32 Conn. 288; Stanford *v.* Andrews, 12 Heisk. 664; Hull *v.* Lee, 61 Mo. 160.

4 Esterly *v.* Purdy, 50 How. Pr. 350; Stoughton *v.* Pasco, 5 Conn. 442; De Mott *v.* Benson, 4 Edw. Ch. 297.

5 Hubbard *v.* Savage, 8 Conn. 215; Brackett *v.* Sears, 15 Mich. 244; Farnum *v.* Burnett, 21 N. J. Eq. 87; Holt *v.* Creamer, 34 N. J. Eq. 188; Witczinski *v.* Everman, 51 Miss. 841; Summers *v.* Roos, 42 Miss. 749; 2 Am. Rep. 653; Murray *v.* Barney, 34 Barb. 336; Robinson *v.* Williams, 22 N. Y. 380; Ackerman *v.* Hunsicker, 85 N. Y. 47; Taylor *v.* Cornelius 60 Pa. St. 187; Foster *v.* Reynolds, 38 Mo. 553; Burgess *v.* Eve, Law R 13 Eq. 450.

6 Rolt *v.* Hopkinson, 9 H. L. Cas. 514; 3 DeGex & J. 177; Heintze *v.* Bentley, 34 N. J. Eq. 562; Boswell *v.* Goodwin, 31 Conn. 74. Compare Hall *v.* Crouse, 13 Hun, 557; Brinkmeyer *v.* Browneller, 55 Ind. 487; Bank of Montgomery's Appeal, 36 Pa. St. 170.

7 Fassett v. Smith, 23 N. Y. 252; Tully v. Harloe, 35 Cal. 302.
8 Beardsley v. Tuttle, 11 Wis. 74.

§ 224. Equitable mortgages.—There are many deeds and contracts which, although wanting some of the characteristics of common-law mortgages, are nevertheless intended as securities for debts or obligations, and such conveyances are called equitable mortgages.[1] And the general rule is, that whenever a conveyance transferring an estate is originally intended as a security, whether this intention appears from the same instrument or any other, it is always considered in equity as a mortgage.[2] Even a deposit of the title deeds as a security will, in England and in some of the States, create an equitable mortgage.[3] Equity looks upon things agreed to be done as actually performed;[4] therefore, an agreement based upon a valuable consideration to give a mortgage will be treated in equity as a mortgage.[5] Even an imperfect agreement intended as a security will be supported in equity as a mortgage.[6] In short, if a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage.[7]

1 See Woods v. Wallace, 22 Pa. St. 171; Gale v. Morris, 29 N. J. Eq. 222; De Leon v. Higuera, 15 Cal. 483.

2 Elliott v. Wood, 53 Barb. 285; Wilcox v. Morris, 1 Murph. 116; 3 Am. Dec. 678; Wilson v. Drumrite, 21 Mo. 325; Woodworth v. Guzman, 1 Cal. 203; Bigelow v. Topliff, 25 Vt. 273; Breckinridge v. Auld, 1 Robt. (Va.) 148; Klinck v. Price, 4 W. Va. 4; 6 Am. Rep. 268.

3 Russel v. Russel, 1 Bro. C. C. 269; Shaw v. Foster, Law R. 5 H. L. Cas. 321; 2 Eng. Rep. 1; Lacon v. Allen, 3 Drew. 582; Baynard v. Woolley, 20 Beav. 583; Jarvis v. Dutcher, 16 Wis. 307; Carey v. Rawson, 8 Mass. 159; Mandeville v. Welch, 5 Wheat. 277. Compare Sydney v. Stevenson, 11 Phila. 178.

4 Chase v. Peck, 21 N. Y. 581; Daggett v. Rankin, 31 Cal. 321; Wright v. Shumway, 1 Wis. 23; Bank v. Carpenter, 7 Ohio, 21.

5 Morrow v. Turney, 35 Ala. 131; Burdick v. Jackson, 7 Hun, 488; Adams v. Johnson, 41 Miss. 258; Miller v. Moore, 3 Jones' Eq. 431.

6 Gill v. Clark, 54 Mo. 415; Love v. Mining Co. 32 Cal. 639; Lake v. Doud, 10 Ohio, 415; Delaire v. Keenan, 3 Desaus. Eq. 74; 4 Am. Dec. 604.

7 Story, J., in Flagg v. Mann, 2 Sum. 533; and see Black v. Gregg, 59 Mo. 565; Barrollhet v. Battelle, 7 Cal. 450; Dwen v. Blake, 44 Ill. 135; Fessler's Appeal, 75 Pa. St. 483; Curtis v. Buckley, 14 Kan. 449; Jones v. Lapham, 15 Kan. 540; Purdy v. Bullard, 41 Cal. 444; Hill v. Eldred, 49 Cal. 398; Case v. McCabe, 35 Mich. 100.

§ 225. Conditional sale or mortgage.—In all doubtful cases, a court of equity will construe the conveyance to be a mortgage rather than a conditional sale.[1] But a conditional sale, if really intended, is valid,[2] and whether a conveyance be a mortgage or a conditional sale must be decided in view of the peculiar circumstances which belong to each case and mark its character.[3] The only true test is the intention of the parties, to be gathered from their situation and the surrounding facts, as well as from the written memorials of the transaction.[4] The inadequacy of the consideration paid is a weighty circumstance to be considered in favor of treating the transaction as a mortgage;[5] but this alone is not controlling unless the inadequacy be gross.[6] As a general rule, a deed, though absolute in form, if intended to secure the payment of money, and the relation of debtor and creditor exists between the grantor and the grantee at the time of its execution, will be treated as a mortgage;[7] but if no such relation exists, and the grantor and grantee, at the time of the execution of the deed, agree in writing that the grantor shall have the option of repurchase in a given time at a certain price, the transaction is a conditional sale.[8] If the transaction was a mortgage at its inception, it remains so; and if it was then a conditional sale, no lapse of time will convert it into a mortgage.[9]

1 Davis *v.* Stonestreet, 4 Ind. 101; McNeill *v.* Norsworthy, 39 Ala. 156; Kent *v.* Lasley, 24 Wis. 634; Conway *v.* Alexander, 7 Cranch, 218; Russell *v.* Southard, 12 How. 139; King *v.* Newman, 2 Munf. 40; Honore *v.* Hutchings, 8 Bush, 687; Sears *v.* Dixon, 33 Cal. 326.

2 Henley *v.* Hotaling, 41 Cal. 22; Goodman *v.* Grierson, 2 Ball & B. 278.

3 Robertson *v.* Campbell, 2 Call, 421; Cornell *v.* Hall, 22 Mich. 383; Heath *v.* Williams, 30 Ind. 495.

4 Steel *v.* Steel, 4 Allen, 417; Oldham *v.* Halley, 2 Marsh. J. J. 114; Hughes *v.* Sheaff, 19 Iowa, 335; Cornell *v.* Hall, 22 Mich. 383.

5 Brown *v.* Dewey, 2 Barb. 28; Matthews *v.* Porter, 16 Fla. 466; Campbell *v.* Dearborn, 109 Mass. 144; Gibbs *v.* Penny, 43 Tex. 560; Wharf *v.* Howell, 5 Binn. 499; Davis *v.* Thomas, 1 Ryan & M. 506; Langton *v.* Horton, 5 Beav. 9. Compare Hill *v.* Grant, 46 N. Y. 496; Carr *v.* Rising, 62 Ill. 19; Slowey *v.* McMurray, 27 Mo. 113.

6 Elliott *v.* Maxwell, 7 Ired. Eq. 246; and see Freeman *v.* Wilson, 51 Miss. 329.

7 Slutz *v.* Desenberg, 28 Ohio St. 371; Montgomery *v.* Spect, 55 Cal. 352; and see § 218, *ante*.

8 Slutz *v.* Desenberg, 28 Ohio St. 371; and see McCaulay *v.* Porter, 71 N. Y. 173; Conway *v.* Alexander, 7 Cranch, 218; Farmer *v.* Grose, 42 Cal. 169; Phillips *v.* Hulszier, 20 N. J. Eq. 308; Budd *v.* Van Orden, 33 N. J. Eq. 143.

9 Tibbs *v.* Morris, 44 Barb. 138; Kearney *v.* Macomb, 16 N. J. Eq. 189; and see Jackson *v.* Richards, 6 Cowen, 619; Peugh *v.* Davis, 96 U. S. 332; Morrison *v.* Brand, 5 Daly, 40.

§ 226. Parol evidence to explain or vary.—It is generally agreed that in a court of law parol evidence is inadmissible to show that an absolute deed of land was intended only as a mortgage.[1] But a court of equity, in the exercise of its peculiar jurisdiction, may allow it to be shown by parol evidence that the object of the conveyance, as intended and understood by the parties, was to create a security for a debt, and therefore a mortgage.[2] In accordance with this doctrine, the admissibility of parol proof, to show a deed absolute on its face to be a mortgage, has become an established rule in nearly every State;[3] and the same rule is declared by the Supreme Court of the United States.[4] In England, such evidence is admissible in equity in cases of fraud, accident, or mistake.[5]

1 Reading *v.* Weston, 8 Conn. 117; McClure *v.* White, 5 Minn. 178; Bragg *v.* Massie, 38 Ala. 89; Bryant *v.* Crosby, 36 Me. 562; Moore *v.* Wade, 8 Kan. 380. Compare Sevort *v.* Service, 21 Wend. 36; Tillson *v.* Moulton, 23 Ill. 468.

2 Townshend *v.* Stangroom, 6 Ves. 328; Bryan *v.* Cowart, 21 Ala. 92; Matthews *v.* Porter, 16 Fla. 466; Russell *v.* Southard, 12 How. 147; Taylor *v.* Luther, 2 Sum. 228; Strong *v.* Stewart, 4 Johns. Ch. 167; Sellers *v.* Stalcup, 7 Ired. Eq. 13; Arnold *v.* Mattison, 3 Rich. Eq. 153.

3 Pierce *v.* Robinson, 13 Cal. 116; Farmer *v.* Grose, 42 Cal. 169; Sutphen *v.* Cushman, 35 Ill. 186; Hancock *v.* Harper, 86 Ill. 445; Berberick *v.* Fritz, 39 Iowa, 700; Campbell *v.* Dearborn, 109 Mass. 130; Welde *v.* Gehl, 21 Minn. 449; Deroln *v.* Jennings, 4 Neb. 97; Sweet *v.* Parker, 22 N. J. Eq. 453; Brown *v.* Clifford, 7 Lans. 46; Horn *v.* Keteltas, 46 N. Y. 610; Hurford *v.* Harned, 6 Oreg. 362; Kent *v.* Lasley, 24 Wis. 654; Wing *v.* Cooper, 37 Vt. 169. Compare Osgood *v.* Thompson Bank, 30 Conn. 27. Otherwise, by statute, in Georgia: Spence *v.* Stedman, 49 Ga. 139; and in New Hampshire Boody *v.* Davis, 20 N. H. 140.

4 Peugh *v.* Davis, 96 U. S. 332; Hughes *v.* Edwards, 9 Wheat. 489.

5 Joynes *v.* Statham, 3 Atk. 388; Sevier *v.* Greenway, 19 Ves. 413; Lincoln *v.* Wright, 4 DeGex & J. 16; Cripps *v.* Jee, 4 Bro. C. C. 472; Card *v.* Jaffray, 2 Schoales & L. 374; and see Crews *v.* Threadgill, 35 Ala. 334; Wells *v.* Morrow, 38 Ala. 125; Chaires *v.* Brady, 10 Fla. 133; Cook *v.* Colyer, 2 Mon. B. 71; Baugher *v.* Merryman, 32 Md. 185; Nichols *v.* Reynolds, 1 R. I. 30.

§ 227. Nature of mortgagor's interest.—According to the settled modern doctrine, the interest of the mortgagor in the mortgaged premises is an estate of inheritance, which he may devise or grant,[1] and which is in no way affected by the mortgage before entry and foreclosure, further than by the lien created.[2] As to all the world except the mortgagee and those claiming under him, the freehold remains in the mortgagor as it existed prior to the mortgage.[3] In most respects he becomes tenant at will to the mortgagee, who may evict him without notice.[4] Until actual foreclosure, the mortgagor may make such arrangements for the use of the property as any other person could during the term;[5] and he cannot be charged with the rents and profits of the premises until the mortgagee shall have obtained actual possession thereof.[6] Courtesy and dower are incidents of a mortgagor's estate.[7] A mortgagor in possession cannot make a lease of the mortgaged premises which will bind the mortgagee;[8] and he may be restrained by injunction from the commission of waste, even before condition broken.[9]

1 White *v.* Whitney, 3 Met. 81; Hitchcock *v.* Harrington, 6 Johns. 295; Wilkins *v.* French, 20 Me. 111; Chamberlain *v.* Thompson, 10 Conn. 243; Buchanan *v.* Munroe, 22 Tex. 537.

2 Kortright *v.* Cady, 21 N. Y. 343; White *v.* Rittenmyer, 30 Iowa, 268; and see § 215, *ante*.

3 Clark *v.* Reach, 6 Conn. 142; Cooper *v.* Davis, 15 Conn. 556; Brown *v.* Snell, 6 Fla. 741; Bradley *v.* Fuller, 23 Pick. 1; Asay *v.* Hoover, 5 Pa. St. 21; Bryan *v.* Butts, 27 Barb. 565; Orr *v.* Hadley, 36 N. H. 578; Childs *v.* Childs, 10 Ohio St. 342; Farnsworth *v.* Boston, 126 Mass. 3, 4; Doe *v.* Goldwin, 2 Ad. & E. N. S. 143; Beamish *v.* Overseers etc. 21 Law. J. N. S. C. P. 9; 7 Eng. L. & Eq. 485.

4 1 Greenl. Cruise, 570. But compare Birch *v.* Wright, 1 Term Rep. 383; Wilder *v.* Houghton, 1 Pick. 87; Toby *v.* Reed, 9 Conn. 225; Jones *v.* Thomas, 8 Blackf. 423; Ayres *v.* Waite, 10 Cush. 74.

5 Ladue *v.* Detroit R. R. Co. 13 Mich. 380.

6 Hughes *v.* Edwards, 9 Wheat. 489; Fitchburg Co. *v.* Melven, 15 Mass. 268; Miss. etc. Railw. Co. *v.* Express Co. 81 Ill. 534; Clarke *v.* Curtis, 1 Gratt. 289.

7 Titus *v.* Neilson, 5 Johns. Ch. 452; Coles *v.* Coles, 15 Johns. 319; Groton *v.* Roxborough, 6 Mass. 50; Clark *v.* Beach, 6 Conn. 142.

8 1 Greenl. Cruise, 574; 4 Kent. Com. 157; Ellithorp *v.* Dewing, 1 Chip. (Vt.) 141. Compare Doe *v.* Hales, 7 Bing. 322; Evans *v.* Elliot, 9 Ad. & E. 342.

9 Smith *v.* Goodwin, 2 Me. 176; Johnson *v.* White, 11 Barb. 194; Brown *v.* Stewart, 1 Md. Ch. 87; Goodman *v.* Kine, 8 Beav. 379.

§ 228. Who may redeem.—An equity of redemption is alienable by deed, devisable by will, and descendible by inheritance.[1] The right of redemption, therefore, exists not only in favor of the mortgagor himself, but it belongs to any person having an interest in or lien upon the land, provided he comes in as privy in estate with the mortgagor.[2] Heirs of the mortgagor, and all who derive an interest from him by purchase or devise, may redeem.[3] So may any subsequent encumbrancer;[4] or a jointress;[5] or dowress;[6] or a tenant by the courtesy.[7] So a person having an easement only in land under mortgage may redeem.[8] And an assignee of a term for years in land previously mortgaged may, to protect his estate, redeem such mortgage.[9]

1 1 Greenl. Cruise, 599; 4 Kent Com. 160; Casborne v. Scarfe, 1 Atk. 603. See § 218, *ante*.

2 Grant v. Duane, 9 Johns. 612; Gibson v. Crehore, 5 Pick. 146; and see Packer v. Rochester etc. R. R. Co. 17 N. Y. 283; Moore v. Beasom, 44 N. H. 215; Parvis v. Brown, 4 Ired. Eq. 413; Hopplu v. Doty, 22 Wis. 621; Pearce v. Morris, Law R. 5 Ch. 227.

3 Bell v. Mayor etc. 10 Paige, 49; Merriam v. Barton, 14 Vt. 501; Elliott v. Patton, 4 Yerg. 10; Smith v. Manning, 9 Mass. 422.

4 Thompson v. Chandler, 7 Me. 377; Strang v. Allen, 44 Ill. 428; Goodman v. White, 26 Conn. 317; Wiley v. Ewing, 47 Ala. 418; Watt v. Watt, 2 Barb. Ch. 371; Lee v. Stone, 5 Gill. & J. 1; 23 Am. Dec. 539; Frost v. Yonkers Savings Bank, 70 N. Y. 553.

5 Howard v. Harris, 1 Vern. 190.

6 1 Greenl. Cruise, 612; and see Davis v. Wetherell, 13 Allen, 60; McCabe v. Bellows, 7 Gray, 148; Van Duyne v. Thayer, 14 Wend. 233; Morris v. Morrison, 45 N. H. 490; Green v. Dixon, 9 Wis. 532; Opdyke v. Bartles, 11 N. J. Eq. 133; Lamb v. Montague, 112 Mass. 352.

7 Eaton v. Simonds, 14 Pick. 98; Rossiter v. Cossitt, 15 N. H. 38. Compare Lamson v. Drake, 105 Mass. 564.

8 Bacon v. Bowdoin, 22 Pick. 401. Compare McDougald v. Capron, 7 Gray, 278.

9 Averill v. Taylor, 8 N. Y. 44; Loud v. Lane, 8 Met. 517; and see Green v. Wynn, Law R. 4 Ch. 204; Hamilton v. Dobbs, 19 N. J. Eq. 227.

§ 229. Payment of mortgage debt.—A party owning an interest of the mortgaged premises is not entitled to redeem, except upon payment of the whole debt.[1] And this is so, however small his interest may be,[2] and notwithstanding the debt itself may be barred by the Statute of Limitations,[3] or is affected with usury.[4] Nor

can he compel other owners of the equity of redemption to contribute;[5] but he would be considered as an equitable assignee of the mortgage, and entitled to hold the entire mortgaged estate until remunerated *pro rata*.[6] The owner of the equity of redemption is not debarred from redeeming a part of the mortgaged estate because the right of redeeming another part has been lost.[7]

1 Falk *v.* Lord Clinton, 12 Ves. 49; Boqut *v.* Coburn, 27 Barb. 230; McCabe *v.* Bellows, 7 Gray, 148; Bradley *v.* Snyder, 14 Ill. 263; Johnson *v.* Candage, 31 Me. 28; Mann *v.* Richardson, 21 Pick. 355; and see Stewart *v.* Clark, 11 Met. 384.

2 Boqut *v.* Coburn, 27 Barb. 230.

3 Pratt *v.* Huggins, 29 Barb. 277; Balch *v.* Onion, 4 Cush. 559.

4 Bridge *v.* Hubbard, 15 Mass. 103; Shufelt *v.* Shufelt, 9 Paige, 145; Sands *v.* Church, 6 N. Y. 347.

5 Clowes *v.* Dickinson, 5 Johns. Ch. 241; Allen *v.* Clark, 17 Pick. 47.

6 Parkman *v.* Welch, 19 Pick. 231; Aiken *v.* Gale, 37 N. H. 505. Compare Saunders *v.* Frost, 5 Pick. 259; Cheesebrough *v.* Millard, 1 Johns. Ch. 425; Salem *v.* Edgerly, 33 N. H. 46.

7 Dexter *v.* Arnold, 1 Sum. 18.

§ 230. When right to redeem is barred.—The rule in equity, adopted in analogy to the Statute of Limitations (21 Jac. 1, c. 16), is, that an equity of redemption is barred by an uninterrupted possession for twenty years by the mortgagee, unless circumstances are proved by the mortgagor showing an acknowledgment of his title by the mortgagee within that period.[1] In other words, twenty years constitute the period after which equity will not admit a mortgagor to redeem without special cause.[2] But the legal period of limitation has been changed by statute in many of the States, and the rule in equity varies in conformity thereto.[3] In England definite periods for suits of this kind have been fixed by statute;[4] and so in a few of the States.[5] But, generally speaking, no lapse of time will bar the right to redeem if the mortgage is treated by the parties during that time as a subsisting mortgage and security only.[6] Nor is any lapse of time a bar to redeem where there is fraud in the transaction;[7] or where, by agreement of parties, the mortgagee had entered to keep possession until his debt

should be paid out of the profits.[8] If the mortgagor be within one of the exceptions to the rule of limitation at law, made on account of disabilities—such as infancy, coverture, or absence from the country — he will be allowed ten years after the removal of such disability within which to enforce his right to redeem.[9] And where the mortgagor continues in undisturbed possession of the mortgaged premises for twenty years after condition broken, without paying rent or interest, or performing any act in recognition of the continued existence of the mortgage, it raises a presumption that the debt has been paid, and that the mortgage has been redeemed.[10]

1 Ayres *v.* Waite, 10 Cush. 72; Gordon *v.* Hobart, 2 Sum. 401; Hughes *v.* Edwards, 9 Wheat. 497; Hurd *v.* Coleman, 42 Me. 182; Randall *v.* Bradley, 65 Me. 43; Jackson *v.* Wood, 12 Johns. 242; Crawford *v.* Taylor, 42 Iowa, 260; Barron *v.* Martin, 19 Ves. 327; Christophers *v.* Sparke, 2 Jacob & W. 235; Blake *v.* Foster, 2 Ball & B. 402.

2 Ayres *v.* Waite, 10 Cush. 76; Anon. 3 Atk. 313.

3 See Jarvis *v.* Woodruff, 22 Conn. 548; Parsons *v.* Noggle, 23 Minn. 328; Peabody *v.* Roberts, 47 Barb. 102; Miner *v.* Beekman, 50 N. Y. 337.

4 Stats. 3 and 4 Wm. 4, c. 27, § 28; 7 Wm. 4, and 1 Vict. c. 28.

5 See Cal. Code Civ. Proc. §§ 346, 347; Miss. Rev. Code, § 2149.

6 Dexter *v.* Arnold, 1 Sum. 109; Tripe *v.* Marcy, 39 N. H. 439; Crawford *v.* Taylor, 42 Iowa, 260.

7 Marks *v.* Pell, 1 Johns. Ch. 594.

8 Marks *v.* Pell, 1 Johns. Ch. 594; Morgan *v.* Morgan, 10 Ga. 297; Orde *v.* Heming, 1 Vern. 418.

9 Beckford *v.* Wade, 17 Ves. 99; and see Bond *v.* Hopkins, 1 Schoales & L. 429; Davis *v.* Evans, 5 Ired. 525; Giles *v.* Baremore, 5 Johns. Ch. 545; Cook *v.* Finkler, 9 Mich. 131.

10 Giles *v.* Baremore, 5 Johns. Ch. 545; Evans *v.* Huffman, 5 N. J. Eq. 354; Cheever *v.* Perley, 11 Allen, 584; Buckmaster *v.* Kelley, 15 Fla. 180; Chick *v.* Rollins, 44 Me. 104; Haskell *v.* Bailey, 22 Conn. 569; Wright *v.* Eaves, 10 Rich. Eq. 582.

§ 231. Nature of mortgagee's interest.—At common law, as between mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee.[1] The legal estate passes to the mortgagee, and he may take immediate possession, unless prevented by the express terms of the contract.[2] But although the legal title passes to the mortgagee, he cannot, while out of possession, be considered or treated as a proprietor or owner of the mortgaged premises.[3] Before foreclosure he can con-

vey no beneficial interest in the land mortgaged, as separate and distinct from the debt;[4] and he has no such interest in it as can be levied upon and taken in execution by his creditors.[5] If the mortgagee dies before foreclosure, the mortgage and debt both go to his executor or administrator;[6] and his widow cannot claim dower in the mortgaged premises.[7] In most respects, until foreclosure, when the mortgagee becomes the absolute owner,[8] the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and otherwise dealt with as the estate of the mortgagor.[9] In equity a mortgage is regarded as a mere security, creating only a lien or encumbrance, not passing any estate in the premises.[10] And this doctrine has had such an increasing influence upon courts of law, that in many of the States such courts now recognize the mortgagor, while in possession, as the true owner of the mortgaged property, and regard the mortgage as a security only.[11] Payment or tender, at any time after the mortgage debt becomes due and before foreclosure, destroys the lien of the mortgage and restores the mortgagor to his full title, and a reconveyance by the mortgagee is not required.[12] But at common law the legal title becomes by default absolutely vested in the mortgagee, subject only to the equity of redemption, and the mortgagor can again become reinvested with the title only by a reconveyance by the mortgagee;[13] and such is still the rule in England,[14] and in some of the States of the Union.[15]

1 Redman *v.* Sanders, 2 Dana, 68; Demarest *v.* Wynkoop, 3 Johns. Ch. 145; Ewer *v.* Hobbs, 5 Met. 1; Howard *v.* Robinson, 5 Cush. 123.

2 Stewart *v.* Barrow, 7 Bush, 368; Wilhelm *v.* Lee, 2 Md. Ch. 322; Whittemore *v.* Gibbs, 24 N. H. 484; § 217, *ante.*

3 Chamberlain *v.* Thompson, 10 Conn. 243, 251; Bates *v.* Coe, 10 Conn. 280; Mills *v.* Shepard, 30 Conn. 98; Great Falls Co. *v.* Worster, 15 N. H. 412; and see Den *v.* Stockton, 12 N. J. L. 322; Gilman *v.* Wills, 66 Me. 273; Smith *v.* Johns, 3 Gray, 517.

4 Aymar *v.* Bill, 5 Johns. Ch. 570; Merritt *v.* Bartholick, 36 N. Y. 44.

5 Jackson *v.* Willard, 4 Johns. 41; Huntington *v.* Smith, 4 Conn. 235; Marsh *v.* Austin, 1 Allen, 240; Trapnall *v.* State Bank, 18 Ark. 53; Thornton *v.* Wood, 42 Me. 282; Buckley *v.* Daley, 45 Miss. 338.

it to his mortgage, and thus "squeeze out" the middle mortgage, and gain preference over it.[1] This doctrine, now abolished in England,[2] had no application to registered mortgages,[3] and it was wholly superseded at an early day in this country by the adoption of the principle of registration.[4] But, although a creditor cannot tack a subsequent mortgage to a prior one, against an intervening incumbrance, yet a mortgagee may take another mortgage, which will be valid against an intervening incumbrance implied by equity, of which the mortgagee had neither actual nor constructive notice.[5]

1 See Marsh *v.* Lee, 2 Vent. 337; Brace *v.* Duchess of Marlborough, 2 P. Wms. 491; Frary *v.* Moore, 4 Price, 475; 1 Greenl. Cruise, 613, note; 4 Kent Com. 176; 1 Wash. Real Prop. 540.

2 Vendor and Purchaser Act, 1874.

3 See Latouche *v.* Lord Dunsany, 1 Schoales & L. 157; Bond *v.* Hopkins, 1 Schoales & L. 430.

4 Grant *v.* U. S. Bank, 1 Caines Cas. 145; Dorrow *v.* Kelley, 1 Dall. 142; Chandler *v.* Dyer, 37 Vt. 345; Humphreys *v.* Newman, 51 Me. 40.

5 Orvis *v.* Newell, 17 Conn. 97; and see Chase *v.* McDonald, 7 Har. & J. 160; Siter *v.* McClanachan, 2 Gratt. 280.

§ 234. Registration.—In this country registry acts exist in the several States, under the provisions of which mortgages, like other conveyances of real estate, are required to be recorded;[1] and if not recorded, the mortgage will be void as against any subsequent purchaser, or mortgagee, in good faith, and for a valuable consideration, of the same estate, or any portion thereof, whose conveyance shall be first duly recorded.[2] The registry of the mortgage has been adopted as the most convenient and certain mode of giving notice of the mortgage to all the world.[3] And subsequent mortgagees or purchasers are so far affected by the constructive notice arising from the registry of a prior mortgage, that they are subject to all the equities existing between the prior mortgagee and mortgagor.[4] They must take notice, at their peril, of all registered mortgages.[5] As between the parties themselves, a mortgage is valid without registration.[6] In some of the States, the lien of a judgment is held to be

superior to an unrecorded mortgage;[7] in others, an unrecorded mortgage will take priority of a subsequent judgment docketed.[8] A mortgage given for the purchase-money of land, and executed at the same time the deed is executed to the mortgagor, takes precedence over all judgments and other debts of the mortgagor.[9] Equitable mortgages are held to be within the registry acts,[10] and a mortgage of an equitable interest, if first recorded, takes priority of a mortgage of the legal estate.[11] So the registration laws are held to be applicable to assignments of mortgages.[12]

1 See 1 N. Y. Rev. Stat. 756, § 1; Dodge v. Potter, 18 Barb. 193; Mass. Gen. Stat. ch. 89, §§ 1, 3; Ill. Rev. Stat. ch. 30, § 28; Iowa Code, §§ 1941, 1942; Watson v. Bondurant, 30 La. An. 2; Brooke's Appeal, 64 Pa. St. 127; Wood's Appeal, 82 Pa. St. 116; Chatham v. Bradford, 50 Ga. 327.

2 See De Vendal v. Malone, 25 Ala. 272; 1 N. Y. Rev. Stat. 762, § 37; Bayley v. Bailey, 5 Gray, 505; King v. Portis, 77 N. C. 25; Nice's Appeal, 54 Pa. St. 200; Cavanaugh v. Peterson, 47 Tex. 195. The registry laws are prospective and not retrospective in their operation: Ackerman v. Hunsicker, 12 N. Y. Week. Dig. 265; 85 N. Y. 43.

3 Grant v. Bissett, 1 Caines Cas. 112; Evans v. Jones, 1 Yeates, 174; Parker v. Wood, 1 Dall. 436; Berry v. Mut. Ins. Co. 2 Johns. Ch. 603.

4 Johnson v. Stagg, 2 Johns. 510; Doe v. Bank of Cleveland, 3 McLean, 140; Parkist v. Alexander, 1 Johns. Ch. 394; Thomson v. Wilcox, 7 Lans. 376; McCabe v. Grey, 20 Cal. 509; Ogden v. Walters, 12 Kan. 282; Hickman v. Perrin, 6 Coldw. 135; Humphreys v. Newman, 51 Me. 40; Routh v. Spencer, 38 Ind. 393; Maxwell v. Brooks, 54 Ind. 98; Heaton v. Prather, 84 Ill. 330; Coe v. Winters, 15 Iowa, 481; Musgrove v. Bonser, 5 Oreg. 313.

5 Grant v. Bissett, 1 Caines Cas. 112; Berry v. Mut. Ins. Co. 2 Johns. Ch. 603; Buchanan v. International Bank, 78 Ill. 500. From the time the mortgage is left for record it is notice to all subsequent purchasers: Mut. Life Ins. Co. v. Dake, 87 N. Y. 257. Compare Bloom v. Noggle, 4 Ohio St. 45; Brooke's Appeal, 64 Pa. St. 127.

6 Seaver v. Spink, 65 Ill. 441; Carleton v. Byington, 18 Iowa, 482; Kirkpatrick v. Caldwell, 32 Ind. 239; McLaughlin v. Hunsen, 85 Pa. St. 364; Jackson v. Colden, 4 Cowen, 266; Sidle v. Maxwell, 4 Ohio St. 236.

7 Hulings v. Guthrie, 4 Pa. St. 123; Friedley v. Hamilton, 17 Serg. & R. 70; Barker v. Bell, 37 Ala. 354; Van Thornily v. Peters, 26 Ohio St. 471; Davidson v. Cowan, 1 Dev. Eq. 470; and see Hendrickson's Appeal, 24 Pa. St. 363.

8 Thomas v. Vanlieu, 28 Cal. 616; Pixley v. Huggins, 15 Cal. 127; Jackson v. Dubois, 4 Johns. 216; Righter v. Forrester, 1 Bush, 278; First Nat. Bank v. Hayzlett, 40 Iowa, 650; Kelly v. Mills, 41 Miss. 267; Hampton v. Levy, 1 McCord Ch. 107; Greenleaf v. Edes, 2 Minn. 264.

9 Curtis v. Root, 20 Ill. 53; Bolles v. Carll, 12 Minn. 113; Wynn v. Carter, 20 Wis. 107; Grant v. Dodge, 43 Me. 489; Dusenbury v. Hulbert, 59 N. Y. 541; Thomas v. Hanson, 44 Iowa, 651; Ahern v. White, 39 Md. 499. A mortgage to secure future indorsements, duly recorded, has preference over a judgment subsequently entered against the mort-

gagor, whether such indorsements were made before or after the entry of the judgment: Ackerman v. Hunsicker, 85 N. Y. 43; 39 Am. Rep. 621.

10 Crane v. Turner, 7 Hun, 257; Hunt v. Johnson, 19 N. Y. 279; Jarvis v. Dutcher, 16 Wis. 307; Bank of Greensboro v. Clapp, 76 N. C. 482.

11 United States Ins. Co. v. Shriver, 3 Md. Ch. 381. Compare Halstead v. Bank of Ky. 4 Marsh. J. J. 554.

12 Bowling v. Cook, 39 Iowa, 200; Belden v. Meeker, 2 Lans. 470; 47 N. Y. 307.

§ 235. Merger.—In cases where the interests of the mortgagor and mortgagee become united in one and the same person, the question frequently arises whether the mortgage is merged by such unity of possession.[1] As a general rule in law, a merger takes place when the entire equitable and legal estates are united in the same person;[2] but if there is an outstanding intervening title, the foundation for the merger does not exist, and the merger does not take place.[3] And in equity, the question of merger depends in each case upon the interest and intent of the parties, and the demands of substantial justice.[4] There will be no merger of the two estates in any case, if it be for the interest of the owner to keep them distinct.[5] The law will even uphold a mortgage in favor of the mortgagee against an intervening title, although the parties had undertaken to discharge the mortgage, provided injustice would not be done thereby.[6] But in no case, except for the advancement of justice, will equity uphold and keep alive a mortgage which has been substantially satisfied.[7] In the absence of a special agreement to that effect, a mortgage is not usually merged by the taking of a new mortgage from the same party upon the same property.[8] And where a mortgagee assigns or transfers the mortgage, and then acquires the absolute title, this does not operate to merge the mortgage.[9] But where, without having assigned his mortgage, he takes a release of, or in any other way acquires, the equity of redemption, the mortgage is merged, unless the interest and intent of the parties intervene to prevent.[10]

1 See James v. Johnson, 6 Johns. Ch. 417; Freeman v. Paul, 3 Me, 260; Walker v. Barker, 26 Vt. 710: Forbes v. Moffatt, 18 Ves. 384.

2 Sherman v. Abbot, 18 Pick. 448; Gardner v. Astor, 3 Johns. Ch. 53; Lockwood v. Sturdevant, 6 Conn. 387; Dickason v. Williams, 129 Mass. 182; 37 Am. Rep. 316.

3 Dutton v. Ives, 5 Mich. 515; Southworth v. Scofield, 51 N. Y. 513; Stantons v. Thompson, 49 N. H. 272.

4 Walker v. Barker, 26 Vt. 710; Mallory v. Hitchcock, 29 Conn. 127; Franklyn v. Hayward, 61 How. Pr. 43; Smith v. Roberts, 62 How. Pr. 196; Knowles v. Carpenter, 8 R. I. 548; Evans v. Kimball, 1 Allen, 240; Duncan v. Smith, 37 N. J. L. 325; Richardson v. Hockenhull, 85 Ill. 124; Duncan v. Drury, 9 Pa. St. 332; Davis v. Pierce, 10 Minn. 376; Grellet v. Hellshorn, 4 Nev. 526; Simonton v. Gray, 34 Me. 50; Forbes v. Moffat, 18 Ves. 384.

5 Polk v. Reynolds, 31 Md. 106; Snyder v. Snyder, 6 Mich. 470; Stantons v. Thompson, 49 N. H. 272.

6 Webb v. Meloy, 32 Wis. 319; Stantons v. Thompson, 49 N. H. 272.

7 McGiven v. Wheelock, 7 Barb. 22; Hutchins v. Carleton, 19 N. H. 487; Worthington v. Morgan, 16 Sim. 547; and compare Powell v. Smith, 30 Mich. 451; Knolls v. Barnhart, 71 N. Y. 474. Conveyance by a mortgagee in possession after default merges the mortgage: Welsh v. Phillips, 54 Ala. 309; 25 Am. Rep. 679.

8 Drury v. Briscoe, 41 Md. 154; Christian v. Newberry, 61 Mo. 446. See Ex parte Higgins, 3 DeGex & J. 33; Rawlszer v. Hamilton, 51 How. Pr. 297.

9 White v. Hampton, 13 Iowa, 259; Purdy v. Huntington, 42 N. Y. 334; 1 Am. Rep. 532; Kellogg v. Ames, 41 N. Y. 259.

10 Wilhelmi v. Leonard, 13 Iowa, 330; Stantons v. Thompson, 49 N. H. 272; and see Shaver v. Williams, 87 Ill. 469; Besser v. Hawthorne, 3 Oreg. 129; Tower v. Divine, 37 Mich. 443; Knowles v. Lawton, 18 Ga. 476; Fithian v. Corwin, 17 Ohio St. 118; New Jersey Ins. Co. v. Meeker, 40 N. J. L. 18.

§ 236. Subrogation.—Subrogation or substitution, by operation of law, to the rights and interests of the mortgagee in the land arises or proceeds on the theory that the mortgage debt is paid.[1] The doctrine is founded upon the equitable principle, that the mortgage being intended as security for the payment of the debt, one who pays the debt acquires a right to the security.[2] Thus, the holder of a junior mortgage is entitled to be subrogated to the rights of the senior mortgagee, upon payment of the amount of the senior mortgage.[3] And although subrogation generally takes place between co-creditors, where the junior pays the debt due to the senior, to secure his own claim,[4] yet, it also arises from the transactions of principals and sureties,[5] and sometimes between co-sureties or co-guarantors.[6] But it is not allowed to volunteer purchasers or strangers, unless

there is some peculiar equitable relation in the transaction,[7] and never to mere meddlers.[8]

1 Ellsworth v. Lockwood, 42 N. Y. 97; Carter v. Taylor, 3 Head, 30, Baldwin v. Thompson, 6 La. 474; Lamb v. Montague, 112 Mass. 352.

2 Cox v. Wheeler, 7 Paige, 258; Gossin v. Brown, 11 Pa. St. 527; Roddy's Appeal, 72 Pa. St. 98; Miller v. Winchell, 70 N. Y. 437; Lockwood v. Marsh, 3 Nev. 138; and see Rardin v. Walpole, 38 Ind. 146; Robinson v. Urquhart, 12 N. J. Eq. 515; Walker v. King, 45 Vt. 525.

3 Dings v. Parshall, 7 Hun, 522; Twombly v. Cassidy, 82 N. Y. 155; Marshall v. Ruddick, 28 Iowa, 437; Gardner v. Emerson, 40 Ill. 296; Wood v. Hubbard, 50 Vt. 82; Carpentier v. Brenham, 40 Cal. 221; Worcester Nat. Bank v. Cheeney, 87 Ill. 602; Gilbert v. Gilbert, 39 Iowa, 657; and see Homeopathic Mut. Life Ins. Co. v. Marshall, 32 N. J. Eq. 103.

4 See Flachs v. Kelly, 30 Ill. 462; Brainard v. Cooper, 10 N. Y. 356; Ellsworth v. Lockwood, 42 N. Y. 89.

5 Root v. Bancroft, 10 Met. 48; Cullum v. Branch Bank, 23 Ala. 797; Hayes v. Ward, 4 Johns. Ch. 123; Burton v. Wheeler, 7 Ired. Eq. 217; Fields v. Sherrill, 18 Kan. 365; Muller v. Wadlington, 5 S. C. 342; Drew v. Lockett, 32 Beav. 499.

6 Low v. Smart, 5 N. H. 353; Cheesebrough v. Millard, 1 Johns. Ch. 409; Stamford Bank v. Benedict, 15 Conn. 437; Dye v. Mann, 10 Mich. 291; Muir v. Berkshire, 52 Ind. 149.

7 Muir v. Berkshire, 52 Ind. 149; Coe v. N. J. etc. R. R. Co. 31 N. J. Eq. 136; and see Bayard v. McGraw, 1 Brad. (Ill.) 184; Tradesmen's Building etc. Assoc. v. Thompson, 32 N. J. Eq. 133.

8 Muir v. Berkshire, 52 Ind. 149.

§ 237. Insurance.—A mortgagor has an insurable interest to the full value of the mortgaged property,[1] and such interest continues so long as he has a right to redeem the land.[2] Upon a loss he is entitled to recover the whole amount insured;[3] and the fact that the mortgagee is in possession of the premises is immaterial.[4] If the mortgage contains a provision which requires the mortgagor to insure for the benefit of the mortgagee, and he does so, the mortgagee is regarded as having an equitable lien upon the proceeds of the policy, although it was taken out in the name of the mortgagor, and was not assigned to the mortgagee.[5] If the mortgagor fails to insure as provided in the mortgage, the mortgagee may cause insurance to be made, and charge the premium to the estate in rendering his account.[6] If there is no provision in the mortgage for insurance for the benefit of the mortgagee, the fact that the mortgagor has taken out

a policy covering the mortgaged premises gives the mortgagee no claim upon the policy or the proceeds of it.[7] A mortgagee may insure his interest as mortgagee,[8] or he may insure as general owner, without disclosing his interest, unless interrogated in reference thereto.[9] His insurable interest is measured by the amount of his claim.[10] Upon an application for insurance, a misrepresentation made in answer to inquiry as to the existence of a mortgage upon the premises will invalidate the policy.[11]

1 Nichols *v.* Baxter, 5 R. I. 491; Stephens *v.* Ill. Mut. Fire Ins. Co. 43 Ill. 327; Strong *v.* Manuf. Ins. Co. 10 Pick. 40.

2 Strong *v.* Manuf. Ins. Co. 10 Pick. 40; Hodges *v.* Tenn. Mar. & Fire Ins. Co. 8 N. Y. 416; Waring *v.* Loder, 53 N. Y. 581.

3 Strong *v.* Manuf. Ins. Co. 10 Pick. 40.

4 Illinois Fire Ins. Co. *v.* Stanton, 57 Ill. 354.

5 Providence County Bank *v.* Benson, 24 Pick. 204; Cromwell *v.* Brooklyn Fire Ins. Co. 44 N. Y. 47; Dunlap *v.* Avery, 23 Hun, 509; In re Sands Ale Brewing Co. 3 Biss. 175; Hazard *v.* Draper, 7 Allen, 267; Vernon *v.* Smith, 5 Barn. & Ald. 1. Compare Stearns *v.* Quincy Mut. Fire Ins. Co. 124 Mass. 61.

6 Fowley *v.* Palmer, 5 Gray, 549.

7 Plimpton *v.* Ins. Co. 43 Vt. 497; Hansox *v.* Fishing Ins. Co. 3 Sum. (C. C.) 132; Carter *v.* Rockett, 8 Paige, 437; Powles *v.* Innes, 11 Mees. & W. 10; and see Dobson *v.* Land, 8 Hare, 216; White *v.* Brown, 2 Cush. 412.

8 White *v.* Brown, 2 Cush. 412; Foster *v.* Van Reed, 70 N. Y. 19; Carpenter *v.* Providence Ins. Co. 16 Peters, 495.

9 Norwich Fire Ins. Co. *v.* Boomer, 52 Ill. 442; Sussex Co. Mut. Ins. Co. *v.* Woodruff, 2 Dutch. 541.

10 Kernochan *v.* New York etc. Ins. Co. 5 Duer, 1; 17 N. Y. 428; Smith *v.* Columbia Ins. Co. 17 Pa. St. 253; Excelsior etc. Ins. Co. *v.* Royal Ins. Co. 7 Lans. 138; 55 N. Y. 343. Compare King *v.* State Mut. Fire Ins. Co. 7 Cush. 1; Clark *v.* Wilson, 103 Mass. 221; McIntire *v.* Plaisted, 68 Me. 363.

11 Smith *v.* Columbia Ins. Co. 17 Pa. St. 253; Draper *v.* Charter Oak Ins. Co. 2 Allen, 569; Van Buren *v.* St. Joseph etc. Ins. Co. 28 Mich. 398. Compare Holmes *v.* Drew, 16 Hun, 491; Lycoming Ins. Co. *v.* Jackson, 83 Ill. 302; Titus *v.* Glens Falls Ins. Co. 81 N. Y. 410.

§ 238. When a violation of condition in policy of insurance.—A mortgage of insured premises by a deed absolute in form is within a condition of the policy that it shall become void upon an alienation of the property insured,[1] and will avoid the policy;[2] otherwise, however, if a separate defeasance be executed at the same

time, and is seasonably recorded.[8] And a mortgage which creates but a lien or security, and which does not transfer the title, is held not to be within a condition against alienation.[4] But after a complete transfer of title by foreclosure, it is then regarded as an alienation within the condition.[5] So of a conveyance and mortgage back to secure the purchase-money.[6] A condition against alienation "in whole or in part,"[7] or against an "alteration of ownership,"[8] is held to be violated by a mortgage of the insured premises.[9] A policy, loss payable to a mortgagee, providing that it should be void if foreclosure proceedings should be commenced against the insured property, is rendered void even where such proceedings are instituted by the mortgagee.[10]

1 Western etc. Ins. Co. *v.* Elker, 10 Mich. 279. But compare Hodges *v.* Tenn. etc. Ins. Co. 8 N. Y. 416; Holbrook *v.* American Ins. Co. 1 Curt. 193.

2 Tomlinson *v.* Monmouth etc. Ins. Co. 47 Me. 232; Foote *v.* Hartford Ins. Co. 119 Mass. 259.

3 Smith *v.* Monmouth etc. Ins. Co. 50 Me. 96.

4 Conover *v.* Mut. Ins. Co. 1 N. Y. 290; Shepherd *v.* Union etc. Ins. Co. 38 N. H. 232; Pollard *v.* Somerset etc. Ins. Co. 42 Me. 221; Com. Ins. Co. *v.* Spankneble, 52 Ill. 53; 4 Am. Rep. 582; Howard Fire Ins. Co. *v.* Bruner, 23 Pa. St. 50; Jackson *v.* Mass. etc. Ins. Co. 23 Pick. 418. But see Indiana etc. Ins. Co. *v.* Coquillard, 2 Ind. 645.

5 McLaren *v.* Hartford Fire Ins. Co. 5 N. Y. 151; Georgia Home Ins. Co. *v.* Kinnier, 28 Gratt. 88; Macomber *v.* Cambridge etc. Ins. Co. 8 Cush. 133; Brunswick Sav. Inst. *v.* Com. Un. Ins. Co. 68 Me. 313; Mt. Vernon Manuf. Co. *v.* Summit etc. Ins. Co. 10 Ohio St. 347. Compare McIntire *v.* Norwich Fire Ins. Co. 102 Mass. 230.

6 Titlemore *v.* Vermont etc. Ins. Co. 20 Vt. 546. Compare Kernochan *v.* New York etc. Ins. Co. 17 N. Y. 428; Foster *v.* Equitable etc. Ins. Co. 2 Gray, 216; Savage *v.* Howard Ins. Co. 52 N. Y. 502; 11 Am. Rep. 741.

7 Abbott *v.* Hampden etc. Ins. Co. 30 Me. 414.

8 Edmands *v.* Mut. etc. Ins. Co. 1 Allen, 311.

9 Edmands *v.* Mut. etc. Ins. Co. 1 Allen, 311; Bates *v.* Com. Ins. Co. 2 Cin. Rep. 195; and see Gould *v.* Holland Purchase Ins. Co. 16 Hun, 538. Compare Hartford Fire Ins. Co. *v.* Walsh, 54 Ill. 164; 5 Am. Rep. 115.

10 Titus *v.* Glens Falls Ins. Co. 81 N. Y. 410; 8 Abb. N. C. 315.

§ 239. Validity of.—As a general rule, a mortgage is to be construed, and its validity tested, by the laws of the place where it is executed,[1] and which were in force at the time of its execution and delivery.[2] But the con-

tract, so far as it is personal, will be controlled by the law prevailing at the place of performance;[8] as where a mortgage is executed in one State, and the mortgage debt is made payable in another State where the land is situated, the legal effect of the contract is governed by the law of the latter State.[4] Again: it is a well-settled rule, that the acquisition of title to real property must be regulated agreeably to the law of the place where it is situated,[5] and this applies as well to mortgages;[6] therefore, as it respects the validity of a mortgage as a conveyance of land, it must be tested by the law of the place where the land lies.[7] It is accordingly held, that a mortgage to secure future advances, and covering lands in a State where such form of mortgage is invalid, will not be recognized in that State, although executed in a State where such a mortgage would be valid.[8]

1 De Wolf *v.* Johnson, 10 Wheat. 367; Beall *v.* Williamson, 14 Ala. 55; Andrews *v.* Torrey, 14 N. J. Eq. 355. Compare Dobbin *v.* Hewett, 19 La. An. 513; Cope *v.* Wheeler, 41 N. Y. 303.

2 Olson *v.* Nelson, 3 Minn. 53; Scheible *v.* Bacho, 41 Ala. 423; Newton *v.* Wilson, 31 Ark. 484; Harrison *v.* Styers, 74 N. C. 290. But see Stillman *v.* Looney, 3 Cold. 20.

3 See Nichols *v.* Cossett, 1 Root, 294; Peck *v.* Mayo, 14 Vt. 38; Scudder *v.* Union Nat. Bank, 91 U. S. 406.

4 Duncan *v.* Helm, 22 La. An. 418; and see Newman *v.* Kershaw, 10 Wis. 333; Townsend *v.* Riley, 46 N. H. 300.

5 Goddard *v.* Sawyer, 9 Allen, 78.

6 Hosford *v.* Nichols, 1 Paige, 220.

7 Goddard *v.* Sawyer, 9 Allen, 78; Griffin *v.* Griffin, 18 N. J. Eq. 104; and see Lyon *v.* McIlvaine, 24 Iowa, 9.

8 Goddard *v.* Sawyer, 9 Allen, 78.

§ 240. Illegality of consideration, etc.—A sufficient consideration is necessary to support a mortgage,[1] but none need be proved, at common law, if the mortgage be under seal.[2] If the consideration be illegal,[3] or against public policy,[4] it will avoid the mortgage.[5] But where the consideration is made up of several distinct transactions, some of which are illegal, and the part which is legal can be separated with certainty from the part which is illegal, the mortgage will be upheld for that part of the consider-

ation free from illegality.[6] A mortgage upon usurious consideration is void only as against the mortgagor and those lawfully holding under him, and cannot be avoided by a purchaser of the mere equity of redemption.[7] Illegality of consideration must be made out by clear proof, and the burden of proof rests upon the party alleging the illegality.[8] A mortgage procured through fraud,[9] or obtained by duress, is void;[10] but in the former case, a fraudulent intent on the part of the mortgagee must be shown,[11] and in the latter case, if by duress of imprisonment, it must appear that the imprisonment was unlawful, and that the mortgage was executed in order to obtain a release therefrom.[12]

1 Fisher *v.* Meister, 24 Mich. 447; Hannan *v.* Hannan, 123 Mass. 441; 25 Am. Rep. 121; and see Bush *v.* Cooper, 26 Miss. 599; Haden *v.* Buddensick, 4 Hun, 649; Schenck *v.* O'Neil, 23 Hun, 209; Bramhall *v.* Flood, 41 Conn. 68; Magruder *v.* State Bank, 18 Ark. 9. There may be a valid gift of a mortgage: Peabody *v.* Peabody, 59 Ind. 556.

2 Parker *v.* Parmele, 20 Johns. 130; Farnum *v.* Burnett, 21 N. J. Eq. 87. In New York, the presumptive evidence of a sufficient consideration afforded by a seal may be rebutted: see Craver *v.* Wilson, 14 Abb. Pr. N. S. 374.

3 Baker *v.* Collins, 9 Allen, 253; Senzeneau *v.* Saloy, 21 La. An. 305; Hyatt *v.* James, 2 Bush, 463.

4 Gilbert *v.* Holmes, 64 Ill. 548; Wildey *v.* Collier, 7 Md. 273; Atwood *v.* Fisk, 101 Mass. 363; Lautz *v.* Buckingham, 4 Lans. 484; Thompson *v.* Hickey, 8 Abb. N. C. 159. Compare Micon *v.* Ashurst, 55 Ala. 607.

5 See Collins *v.* Blantern, 2 Wils. 341; Brewster *v.* Madden, 15 Kan. 249; Patterson *v.* Donner, 48 Cal. 369; Deming *v.* State, 23 Ind. 416.

6 Feldman *v.* Gamble, 26 N. J. Eq. 494; Cook *v.* Barnes, 36 N. Y. 520. See Johnson *v.* Richardson, 38 N. H. 353; Atwood *v.* Fisk, 101 Mass. 363. It has been held that a mortgage given to secure the payment of a loan, and dated on a secular day of the week, may be enforced although the note was made and delivered and the money borrowed on Sunday: Gwinn *v.* Simes, 61 Mo. 335. Compare Faxon *v.* Folvey, 110 Mass. 392.

7 Green *v.* Kemp, 13 Mass. 515; 7 Am. Dec. 169; Pinnell *v.* Boyd, 33 N. J. Eq. 190; and see Gerrish *v.* Mace, 9 Gray, 237; Westerfield *v.* Bried, 26 N. J. Eq. 357; More *v.* Deyoe, 22 Hun, 263; Berdan *v.* Sedgwick, 44 N. Y. 626; Maher *v.* Lanfrom, 86 Ill. 513; Wright *v.* Bundy, 11 Ind. 398; Waterman *v.* Curtis, 26 Conn. 241; Cavow *v.* Kelly, 59 Barb. 239; Greene *v.* Tyler, 39 Pa. St. 361. That the defense of usury is personal to the mortgagor: see Lamoille County Bank *v.* Bingham, 50 Vt. 105; McGuire *v.* Van Pelt, 55 Ala. 344; Sayre *v.* Fenno, 3 Ala. 458.

8 Brigham *v.* Potter, 14 Gray, 522; Stuart *v.* Phelps, 39 Iowa, 14.

9 Gross *v.* McKee, 53 Miss. 536; Wartemberg *v.* Spiegel, 31 Mich. 400; Wright *v.* Peet, 36 Mich. 213; Mason *v.* Daly, 117 Mass. 403. Compare Starke *v.* Etheridge, 71 N. C. 240; Wright *v.* Morgan, 4 Baxt. 385; Sanborn *v.* Osgood, 16 N. H. 112.

10 Eyster *v.* Hatheway, 50 Ill. 521; Central Bank *v.* Copeland, 18 Md. 305.

11 Mackler v. McClelland, 21 La. An. 579; and see Blackwell v. Cummings, 68 N. C. 121.

12 Plant v. Gunn, 2 Woods, 372; and see Snyder v. Braden, 58 Ind. 143; Compton v. Bunker Hill Bank, 96 Ill. 301; 36 Am. Rep. 147; Bush v. Brown, 49 Ind. 573; 19 Am. Rep. 695.

§ 241. Nature of foreclosure.—Foreclosure is the process adopted by the mortgagee for extinguishing the mortgagor's right of redemption, whereby the estate becomes the absolute property of the mortgagee.[1] At any time after the debt becomes due, and a default is made in the payment of it according to the terms of the contract, the mortgagee may exhibit his bill in a court of equity against the mortgagor, and compel him to redeem by the payment of the debt, or submit to a foreclosure, and be forever barred any right of redemption.[2] This process, known as a "strict foreclosure," is the usual English practice,[3] and it was adopted in several of the States.[4] It is a severe remedy, and should be adopted only where the interests of both parties require it.[5] In New York it is rarely pursued, except in cases where a foreclosure has once been had, and the premises sold; but some judgment creditor, or person similarly situated, not having been made a party, has a right to redeem.[6] A more prevalent mode of foreclosure in the United States is by a sale of the property to the highest bidder, under the direction of an officer of the court, the proceeds being applied to the discharge of encumbrances according to priority, and the balance, if any, is paid over to the mortgagor.[7] But both the modes above mentioned are to a great extent superseded by statutory enactments on the subject in the several States; [8] and where this is the case, the provisions of the statute should be strictly pursued.[9] The right to foreclose may be lost by lapse of time;[10] as where the mortgagor has been suffered to occupy the mortgaged premises for more than twenty years after the debt is due and payable, without any entry or claim by the mortgagee, it will bar the claim of the latter on the presumption that he has been paid.[11]

1 See Packer v. Rochester etc. R. R. Co. 17 N. Y. 287; Swift v. Edson, 5 Conn. 531; Johnson v. Donnell, 15 Ill. 100; Weiner v. Wilcox, 25 Ill. 274; Bradley v. Chester Valley R. R. Co. 36 Pa. St. 150.

2 1 Greenl. Cruise, 691; Lansing v. Goelet, 9 Cowen, 351; Caufman v. Sayre, 2 Mon. B. 206; Van Husan v. Kanouse, 13 Mich. 303; Derby Bank v. Landon, 3 Conn. 62.

3 See 4 Kent Com. 181; 1 Greenl. Cruise, 691. Under Stat. 15 and 16 Vict. c. 86, § 48, the court may direct a sale of the property at the request of either party, instead of decreeing a foreclosure: Wms. Real Prop. 356.

4 See Mix v. Hotchkiss, 14 Conn. 45; Newall v. Wright, 3 Mass. 155; Chamberlain v. Gardner, 38 Me. 548; Botham v. McIntier, 19 Pick. 346; Johnson v. Donnell, 15 Ill. 97.

5 Bolles v. Duff, 43 N. Y. 474; 10 Abb. Pr. N. S. 399; 41 How. Pr. 355; Johnson v. Donnell, 15 Ill. 97.

6 Bolles v. Duff, 43 N. Y. 474; 41 How. Pr. 355; 10 Abb. Pr. N. S. 399; and see Wilder v. Haughey, 21 Minn. 101.

7 4 Kent Com. 181; Lansing v. Goelet, 9 Cowen, 352, 355; Shrieker v. Field, 9 Iowa, 366; Mussina v. Bartlett, 8 Port. 288; Beloe v. Rogers, 9 Cal. 123; Riley v. M'Cord, 24 Mo. 265; Mills v. Dennis, 3 Johns. Ch. 369. It is now the practice in England to insert in mortgages a power of sale upon default of payment: Corder v. Morgan, 18 Ves. 344; In re Richardson, Law R. 12 Eq. 398.

8 See Corley v. Hobart, 8 Clarke, 358; Gamut v. Gregg, 37 Iowa, 573; Henderson v. Lowry, 5 Yerg. 240; Babcock v. Perry, 8 Wis. 277; Russell v. Brown, 41 Ill. 183; Armstrong v. Koss, 20 N. J. Eq. 109; Champenois v. Fort, 45 Miss. 355; Buckner v. Sessions, 27 Ark. 225; Holmes v. Taylor, 48 Ind. 169; Tootle v. White, 4 Neb. 401.

9 Williamson v. Crawford, 7 Blackf. 12. Even an agreement in the mortgage itself as to some other mode of forclosure than that prescribed would be ineffectual: Chase v. McLellan, 49 Me. 375.

10 Howland v. Shurtleff, 2 Met. 26.

11 Hughes v. Edwards, 9 Wheat. 499; and see Fry v. Shehee, 55 Ga. 208; Hoffman v. Harrington, 33 Mich. 392; Nevitt v. Bacon, 32 Miss. 212; Boon v. Pierpont, 28 N. J. Eq. 7.

§ 242. Effect of foreclosure.—The power is inherent in a court of equity to render such judgment or decree in foreclosure proceedings as substantial justice between the parties may require.[1] And in some of the States courts of law are invested by statute with this power.[2] In general, the only effect of foreclosure proceedings is to bar the mortgagor's right of redemption,[3] leaving the mortgagee to pursue his legal remedies to establish his title to the estate.[4] The estate, which was conditional and defeasible in its creation, becomes absolute in the mortgagee;[5] and the incidents, privileges, and covenants attached to it, unchanged by anything which the mortgagor or any other person may have done

in the mean time, remain attached to it, as if the original conveyance had been absolute.[6] But a foreclosure, strict or otherwise, does not of itself operate to discharge the mortgage debt,[7] and the mortgagee may sue at law for the balance remaining due to him,[8] the land being deemed payment *pro tanto*, according to its value.[9]

1 See Palmer *v.* Mead, 7 Conn. 149; Hurtt *v.* Crane, 36 Md. 19; Jones *v.* St. John, 4 Sand. Ch. 208.

2 See McCurdy's Appeal, 65 Pa. St. 290; State Bank *v.* Wilson, 9 Ill. 57; Perkins *v.* Woods, 27 Mo. 547; Shields *v.* Miller, 9 Kan. 397; Holmes *v.* Taylor, 48 Ind. 169.

3 Bradley *v.* Chester Valley R. R. Co. 36 Pa. St. 150; Weiver *v.* Heintz, 17 Ill. 259; Packer *v.* Rochester etc. R. R. Co. 17 N. Y. 287.

4 Jones *v.* St. John, 4 Sand. Ch. 208; Palmer *v.* Mead, 7 Conn. 149; Sutton *v.* Stone, 2 Atk. 101. See Skinner *v.* Beatty, 16 Cal. 156; Bright *v.* Pennywit, 21 Ark. 130; Jackson *v.* Warren, 32 Ill. 331.

5 Lannay *v.* Wilson, 30 Md. 536; Goodman *v.* White, 26 Conn. 322.

6 Ritger *v.* Parker, 8 Cush. 149. Compare Burton *v.* Lies, 21 Cal. 91.

7 Vansant *v.* Allmon, 23 Ill. 30; Porter *v.* Pillsbury, 36 Me. 278; Hatch *v.* White, 2 Gall. 152; Nunemacher *v.* Ingle, 20 Ind. 135; Paris *v.* Hulett, 26 Vt. 308.

8 Lansing *v.* Goelet, 9 Cowen, 346; Stevens *v.* Dufour, 1 Blackf. 387; Watson *v.* Hawkins, 60 Mo. 550; Hatch *v.* White, 2 Gall. 152; Tooke *v.* Hartley, 2 Bro. C. C. 125.

9 Dunkley *v.* Van Buren, 3 Johns. Ch. 330; Johnson *v.* Candage, 31 Me. 18; Hurd *v.* Coleman, 42 Me. 182; Doe *v.* M'Loskey, 1 Ala. 708; Green *v.* Cross, 45 N. H. 574. If the debt is payable by installments, a bill to foreclose may be filed on default of the first payment: Lansing *v.* Capron, 1 Johns. Ch. 617; but the decree should not include installments not yet due: Lansing *v.* Capron, 1 Johns. Ch. 617; King *v.* Longworth, 7 Ohio (2d part), 131; and see Manning *v.* McClurg, 14 Wis. 350; Skelton *v.* Ward, 51 Ind. 46; Magruder *v.* Eggleston, 41 Miss. 184. It has been held that a suit for the debt opens the foreclosure: Perry *v.* Barker, 13 Ves. 198. But see *contra:* Hatch *v.* White, 2 Gall. 154; Lansing *v.* Goelet, 9 Cowen, 346; and compare Lawrence *v.* Fletcher, 10 Met. 347. See, as to waiver of foreclosure: Moore *v.* Beason, 44 N. H. 215; Strong *v.* Blanchard, 4 Allen, 538; Freeman *v.* Atwood, 50 Me. 473; Clark *v.* Crosby, 101 Mass. 184; Trow *v.* Berry, 113 Mass. 139. The lien of the mortgage is not merged in a judgment of foreclosure: Evansville Gas-Light Co. *v.* State, 73 Ind. 219; 38 Am. Rep. 129; Stahl *v.* Roost, 34 Iowa, 475.

§ 243. Power of sale in mortgage.—It is now usual to insert in a mortgage a power of sale upon breach of condition, the exercise of which, by the mortgagee, is an effectual foreclosure and bar to the equity of redemption.[1] It is a cumulative remedy, and does not affect the right to resort to any other legal or equitable proceeding to enforce the mortgage.[2] The power to sell may be con-

ferred by a separate instrument,[3] or it may even arise by necessary implication.[4] And a sale under the power is good as against the mortgagor, although neither the mortgage nor the power has been recorded.[5] While the mortgagee retains the mortgage, he only can exercise the power.[6] But the power to sell, being coupled with an interest, will vest in any person who, by assignment or otherwise, becomes entitled to the money secured to be paid.[7] The power may be executed even after the death of the mortgagor.[8] Nor is it revoked or suspended by the insanity of the mortgagor.[9] Nor by the fact that he is within the lines of an enemy at war with his country, when he is voluntarily there, and for the purpose of engaging in hostilities against his country.[10] In some cases, a court of equity will interfere by injunction to restrain the exercise of the power to sell, as where it is sought to use it for a purpose foreign to that for which it was intended.[11] But in general, the grounds for interference by injunction must be very strong.[12]

1 Waters *v.* Randall, 6 Met. 484; Brisbane *v.* Stoughton, 17 Ohio, 482; Jackson *v.* Henry, 10 Johns. 185; Barnes *v.* Ehrman, 74 Ill. 402; Lydston *v.* Powell, 101 Mass. 77; Hyman *v.* Devereux, 63 N. C. 624; Calloway *v.* People's Bank, 54 Ga. 441; Longwith *v.* Butler, 8 Ill. 32; Clarke *v.* Royal Panopticon, 4 Drew. 26; Leigh *v.* Lloyd, 35 Beav. 455; In re Chawner's Will, L. R. 8 Eq. 569; Cruikshank *v.* Duffin, L. R. 13 Eq. 555. But compare Sanders *v.* Richards, 2 Coll. 586; Cheevning *v.* Cox, 1 Rand. 306.

2 Fogarty *v.* Sawyer, 17 Cal. 589; Cormerais *v.* Genella, 22 Cal. 116; Hyde *v.* Warren, 46 Miss. 13; Carradine *v.* O'Connor, 21 Ala. 573; Wayne *v.* Hanham, 9 Hare, 62; Montague *v.* Dawes, 12 Allen, 397.

3 Brisbane *v.* Stoughton, 17 Ohio, 482.

4 Munday *v.* Vawter, 3 Gratt. 518; Purdie *v.* Whitney, 20 Pick. 25. A sale under a power in a mortgage must pursue strictly as to time and place the stipulation in the mortgage, otherwise the sale will be held void: Hall *v.* Towne, 45 Ill. 493. And see Thompson *v.* Heywood, 129 Mass. 403.

5 Jackson *v.* Colden, 4 Cowen, 266. Compare Wells *v.* Wells, 47 Barb. 416.

6 See Wilson *v.* Troup, 2 Cowen, 195; Cohoes *v.* Goss, 13 Barb. 137.

7 Wilson *v.* Troup, 2 Cowen, 195; Cheek *v.* Waldrum, 25 Ala. 152; Pickett *v.* Jones, 63 Mo. 195; Randall *v.* Hazleton, 12 Allen, 412; Bush *v.* Sherman, 80 Ill. 160; McGuire *v.* Van Pelt, 55 Ala. 344; Harniskell *v.* Orndorff, 35 Md. 341; Wilson *v.* Bennett, 5 DeGex & S. 475. Although a mortgage is deemed only a security, it does not negative the idea that a power of sale in a mortgage is a power coupled with an interest: Calloway *v.* People's Bank, 54 Ga. 441.

8 Bergen v. Bennett, 1 Caines Cas. 1; Hunt v. Rousmanier, 8 Wheat. 174; Connors v. Holland, 113 Mass. 50; Corder v. Morgan, 18 Ves. 344.

9 Encking v. Simmons, 28 Wis. 272.

10 Ludlow v. Ramsey, 11 Wall. 581. Compare Seymour v. Bailey, 66 Ill. 288; De Jarnette v. De Giverville, 56 Mo. 440; Dorsey v. Dorsey, 30 Md. 522; Dean v. Nelson, 10 Wall. 158.

11 Davey v. Durant, 1 DeGex & J. 535; and see Bedell v. McClellan, 11 How. Pr. 172; Montgomery v. McEwen, 9 Minn. 103. A sale of land under a power contained in a second mortgage of the entire estate free from encumbrances is invalid: Donohue v. Chase, 130 Mass. 137.

12 Frieze v. Chapin, 2 R. I. 432; Bedell v. McClellan, 11 How. Pr. 172.

§ 244. Accounting by mortgagee.—The right of the mortgagor to an account of the rents and profits of the land received by the mortgagee is purely of equitable cognizance.[1] The mortgagee in possession takes the rents and profits in the *quasi* character of trustee or bailiff of the mortgagor,[2] and they are applied in equity as an equitable set-off to the amount due on the mortgage debt.[3] The necessity of resorting to an accounting in equity, in order to have them so applied, is the same where the doctrine prevails that the mortgagor retains the legal title as where it is held that the mortgage conveys the legal title to the mortgagee.[4] In many cases complicated equities must be determined and adjusted before it can be ascertained what part, if any, of the rents and profits received is to be applied upon the mortgage debt.[5] The mortgagee is entitled to have them applied, in the first instance, to reimburse him for taxes and necessary repairs made upon the premises;[6] for sums paid by him upon prior encumbrances upon the estate, in order to protect the title, and for costs in defending it;[7] and if he has made permanent improvements upon the land, in the belief that he was the absolute owner, the increased value by reason thereof may be allowed him.[8] It is generally true that a mortgagee in possession is bound to keep the premises in ordinary repair,[9] and he must account for the reasonable rental value of the premises, without regard to the net profit.[10] But if he has judiciously rented the premises to a third person, he

will then be chargeable only with the amount of rent received.[11] He is not bound to engage in any speculations for the benefit of his mortgagor, but is only liable for willful default.[12] In England a mortgagee in possession may not charge for personal services in caring for the estate, collecting rents, etc., unless it is necessary to employ a bailiff to transact the business;[13] but in this country compensation for personal services has been allowed.[14]

1 Seaver v. Durant, 39 Vt. 103; Givens v. McCalmot, 4 Watts, 464; Gordon v. Hobart, 2 Story (C. C.) 243; Parsons v. Welles, 17 Mass. 419; Bell v. Mayor etc. 10 Paige, 49; Farrant v. Lovel, 3 Atk. 723.

2 See Gibson v. Crehore, 5 Pick. 146; Hunt v. Maynard, 6 Pick. 489.

3 Ruchman v. Astor, 9 Paige, 517; and see Chapman v. Porter, 69 N. Y. 276; Reitenbaugh v. Ludwick, 31 Pa. St. 131; Harrison v. Wyse, 24 Conn. 1.

4 Hubbell v. Moulson, 53 N. Y. 225; 13 Am. Rep. 519.

5 See Hubbell v. Moulson, 53 N. Y. 225; 13 Am. Rep. 519; Cookes v. Culbertson, 9 Nev. 199; Chapman v. Smith, 9 Vt. 153.

6 Hubbell v. Moulson, 53 N. Y. 225; 13 Am. Rep. 519; Sparhawk v. Willis, 5 Gray, 423; Hidden v. Jordon, 28 Cal. 301; 32 Cal. 397; Harper's Appeal, 64 Pa. St. 315; Moore v. Cable, 1 Johns. Ch. 385; Strong v. Blanchard, 4 Allen, 533; Harper v. Ely, 70 Ill. 581.

7 Harper v. Ely, 70 Ill. 581; Davis v. Winn, 2 Allen, 111; and see Davis v. Beau, 114 Mass. 360; Sandon v. Hooper, 6 Beav. 248.

8 Benedict v. Gilman, 4 Paige, 58; Putnam v. Ritchie, 6 Paige, 390; Gillis v. Martin, 2 Dev. Eq. 470; 25 Am. Dec. 729; Bacon v. Cottrell, 13 Minn. 194; Roberts v. Fleming, 53 Ill. 204; Miner v. Beekman, 50 N. Y. 337; Reed v. Reed, 10 Pick. 400.

9 Godfrey v. Watson, 3 Atk. 517; Cumber v. Gilman, 15 Ill. 381; Barnett v. Nelson, 54 Iowa, 41; 37 Am. Rep. 183; Shaeffer v. Chambers, 2 Halst. Ch. 548. Compare Rowe v. Wood, 2 Jacob & W. 553; Campbell v. Macomb, 4 Johns. Ch. 534.

10 Boston Iron Co. v. King, 2 Cush. 400; Kellogg v. Rockwell, 19 Conn. 446; Sanders v. Wilson, 34 Vt. 318; Montgomery v. Chadwich, 7 Iowa, 114; Barnett v. Nelson, 54 Iowa, 41; 37 Am. Rep. 183.

11 Barnett v. Nelson, 54 Iowa, 41; 37 Am. Rep. 183.

12 Hughes v. Williams, 12 Ves. 493; and see Barron v. Paulling, 38 Ala. 292; Moore v. Titman, 44 Ill. 367; Montague v. Boston etc. R. R. Co. 124 Mass. 242; Walsh v. Rutgers Fire Ins. Co. 13 Abb. Pr. 33. If the mortgagor remains in possession and takes the profits, the mortgagee is not of course accountable for them: Reynolds v. Canal etc. Co. 30 Ark. 520.

13 Chambers v. Goldwin, 5 Ves. 834; Godfrey v. Watson, 3 Atk. 517; Davis v. Dendy, 3 Madd. 170; and see Elmer v. Loper, 25 N. J. Eq. 475; Benham v. Rowe, 2 Cal. 387; Eaton v. Simonds, 14 Pick. 98; Harper v. Ely, 70 Ill. 581.

14 See Waterman v. Curtis, 26 Conn. 241; Gerrish v. Black, 104 Mass. 400; Granberry v. Granberry, 1 Wash. (Va.) 246.

CHAPTER XXII.

TITLE.

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§ 246. Definition.—A title is defined to be the means whereby the owner of the lands or other real property has the just and legal possession and enjoyment of it.[1] This definition has respect not only to the instruments of conveyance, as deeds, wills, and other muniments of ownership, but also to those acts of possession and occupation which usually attend the title.[2] Several stages or degrees are said to be requisite to a complete title to lands and tenements, namely, the mere naked possession, or actual occupation of the estate, the right of possession, and the right of property.[3] The union of these three constitute a complete title.[4] Actual possession alone is *prima facie* evidence of a legal title,[5] and without actual possession, no title is complete or perfect.[6] The *right* of possession may exist in one person, while the actual possession is in another.[7] There is an *apparent* right of possession, which may be rebutted by a better right,[8] and an *actual* right of possession, which will stand the test against all opposing claims.[9] The mere

right of property, without either possession, or even the right of possession, is frequently designated as the mere right, *jus merum*;[10] the estate of the owner is in such case said to be divested, and turned to a right.[11]

1 Co. Litt. 345 *b*; 2 Greenl. Cruise, 127; 2 Blackst. Com. 195. See Burt. Real Prop. § 418. Title means the same thing as ownership: Walk. Am. Law, 317.

2 See Will. Real Estate, 312, 313.

3 2 Blackst. Com. 195, *et seq.*; and see Donovan *v.* Pitcher, 53 Ala. 411; 25 Am. Rep. 634.

4 2 Blackst. Com. 199; Co. Litt. 266; Fitzhugh *v.* Croghan, 2 Marsh. J. J. 429; 19 Am. Dec. 139.

5 2 Blackst. Com. 196; 2 Greenl. Cruise, 127, 128; and see Colvin *v.* Warford, 20 Md. 395; Hyatt *v.* Wood, 4 Johns. 157; Campbell *v.* Arnold, 1 Johns. 511; Tuttle *v.* Jackson, 6 Wend. 213; 21 Am. Dec. 306; Herbert *v.* Herbert, Breese, 354; 12 Am. Dec. 192.

6 2 Blackst. Com. 196. See Morrison *v.* Kelly, 22 Ill. 610; Hughes *v.* Graves, 30 Vt. 359; Ricard *v.* Williams, 7 Wheat. 105

7 2 Greenl. Cruise, 129; 2 Blackst. Com. 196.

8 2 Blackst. Com. 196.

9 2 Blackst. Com. 196; 2 Greenl. Cruise, 130; Litt. § 385; Smith *v.* Tyndal, 2 Salk. 685.

10 Co. Litt. 345; 2 Blackst. Com. 197.

11 2 Blackst. Com. 197; 2 Greenl. Cruise, 130, 131.

§ 247. How acquired in general.—The modes of acquiring title to real property are reduced to two only, regarded as classes, namely, descent and purchase.[1] Title by descent is where the title is vested in a person by the single operation of law;[2] and title by purchase is where the title is vested by the person's own act or agreement.[3] The latter includes every mode of acquisition known to the law,[4] except that by which a person, upon the death of his ancester, acquires his estate by right of representation, as his heir at law.[5]

1 See Co. Litt. 18; 2 Blackst. Com. 201; 2 Greenl. Cruise, 133; 4 Kent Com. 373; 2 Wash. Real Prop. 401; Pemberton *v.* Hicks, 1 Binn. 1.

2 Co. Litt. 18; Donahue's Estate, 36 Cal. 329.

3 Co. Litt. 18; 2 Blackst. Com. 201.

4 2 Blackst. Com. 241; and see Donahue's Estate, 36 Cal. 329.

5 2 Blackst. Com. 201.

§ 248. By prescription.—Title to real property by prescription is founded on the presumption that he who

has had a quiet and uninterrupted possession of a thing for a long period of years is supposed to have a just right, without which he could not have been suffered to continue in the enjoyment of it.[1] This kind of title, like custom, is founded on long usage;[2] but it differs from custom, as constituting not the law of a certain locality, but the right of an individual.[3] Custom is local and prescription personal in its nature.[4] Technically speaking, prescription applies only to incorporeal hereditaments—such as rents, rights of way, and the like—and not to land or corporeal property.[5] Title to land requires the higher evidence of corporeal seizin and inheritance.[6] But in this country, prescription has generally been put upon the ground of the presumption of a previous grant or agreement, which has been lost by lapse of time;[7] and the presumption applies as well to a grant of lands as to incorporeal hereditaments.[8] A grant of land may as well be presumed as a grant of a fishery, or of a common, or of a way.[9]

1 2 Greenl. Cruise, 221; and see Ricard *v.* Williams, 7 Wheat. 109; Coolidge *v.* Learned, 8 Pick. 503. Title by prescription cannot be acquired by possession unaccompanied by any claim of ownership: Wafer *v.* Pratt, 1 Rob. (La.) 41; 36 Am. Dec. 681.

2 Coolidge *v.* Learned, 8 Pick. 503; Perley *v.* Langley, 7 N. H. 233.

3 Perley *v.* Langley, 7 N. H. 233; Wallace *v.* Morgan, 23 Ind. 399; Tyson *v.* Smith, 9 Ad. & E. 401; Bland *v.* Lipscombe, 30 Eng. L. & Eq. 189.

4 Cortelyou *v.* Van Brundt, 2 Johns. 362.

5 Cortelyou *v.* Van Brundt, 2 Johns. 362; Ferris *v.* Brown, 3 Barb. 105; Hall *v.* McLedd, 2 Met. (Ky.) 98.

6 Cortelyou *v.* Van Brundt, 2 Johns. 362.

7 Coolidge *v.* Learned, 8 Pick. 503; Valentine *v.* Piper, 22 Pick. 85; 33 Am. Dec. 715; Powell *v.* Bogg, 8 Gray, 443; Charles River Bridge Co. *v.* Warren Bridge Co. 7 Pick. 449; Edson *v.* Munsell, 10 Allen, 568; Den *v.* Mulford, 1 N. J. 500; Burbank *v.* Fay, 5 Lans. 397; Casey *v.* Inloes, 1 Gill, 430; Roods *v.* Symmes, 1 Ohio, 216; Chew *v.* Morton, 10 Watts, 221; Commonw. *v.* Coupe, 128 Mass. 63; and see Webb *v.* Bird, 13 Com. B. N. S. 841.

8 Deery *v.* Cray, 5 Wall. 795; Melvin *v.* Proprietors etc. 16 Pick. 137.

9 Ricard *v.* Williams, 7 Wheat. 109.

§ 249. Time of prescription.—By the English law, the term of possession or use requisite to raise a right by

prescription was for a time beyond the memory of man;[1] and the beginning of the reign of Richard I. was fixed as the limit of legal memory.[2] This period was reduced by Statute 32 Henry 8, to sixty years.[3] But for some reason this statute was construed with great strictness by the English courts, and the time of prescription for incorporeal rights remained as before.[4] The inconvenience was, however, obviated in practice, by allowing the jury to presume a grant after a long period of enjoyment,[5] and the period was fixed at twenty years, by analogy from the limitation prescribed by statute (21 Jac. 1, c. 21), for actions of ejectment.[6] The presumption is not founded on a belief that a grant has actually been made in the particular case, but on the general presumption that a man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time, and the policy of not disturbing long-continued possessions.[7] The period of prescription varies in the different States, according to the period fixed by law as the limitation of all real actions;[8] but in many of the States the requisite time is twenty years.[9]

1 Co. Litt. 115 *a*; 2 Greenl. Cruise, 226; Pringe *v.* Child, 2 Rolle Abr. 269.

2 2 Greenl. Cruise, 226; Lehigh Valley R. R. Co. *v.* McFarlan, 43 N. J. L. 617, 618; and see Edson *v.* Munsell, 10 Allen, 561. The matter is now regulated by Statute 2 and 3 Will. 4, c. 71. And see Glover *v.* Coleman, L. R. 10 C. P. 103; 11 Eng. R. 275.

3 Edson *v.* Munsell, 10 Allen, 561, 562.

4 Edson *v.* Munsell, 10 Allen. 562; Coolidge *v.* Learned, 8 Pick. 503, 508.

5 Jenkins *v.* Harvey, 1 Cromp. M. & R. 877; Watkins *v.* Peck, 13 N. H. 360; Bolivar Manuf. Co. *v.* Neponset Manuf. Co. 16 Pick. 247.

6 See § 137, *ante;* Currier *v.* Gale, 3 Allen, 330; Brubaker *v.* Paul, 7 Dana, 428; 32 Am. Dec. 111.

7 Hillary *v.* Waller, 12 Ves. 239; Coolidge *v.* Learned, 8 Pick. 508; Melvin *v.* Waddell, 75 N. C. 361; Ricard *v.* Williams, 7 Wheat. 109; and see Tyler *v.* Wilkinson, 4 Mason, 402; Strickler *v.* Todd, 10 Serg. & R. 63.

8 See Arbuckle *v.* Ward, 29 Vt. 43; Salle *v.* Primm, 3 Mo. 529; Fox *v.* Blossom, 17 Blatchf. 352; Okeson *v.* Patterson, 29 Pa. St. 22; Washabaugh *v.* Entriken, 34 Pa. St. 74; Mead *v.* Leffingwell, 83 Pa. St. 137; § 137, *ante.*

9 Edson *v.* Munsell, 10 Allen, 566; Miller *v.* Garlock, 8 Barb. 153; Stein *v.* Burden, 24 Ala. 130; Lehigh Valley R. R. Co. *v.* McFarlan, 43

N. J. L. 605; Webbs v. Hynes, 9 Mon. B. 388; Trask v. Ford, 39 Me. 437. But a grant cannot be presumed against a person legally incapable of making it: Barker v. Richardson, 4 Barn. & Ald. 579; and see Watkins v. Peck, 13 N. H. 377; Edson v. Munsell, 10 Allen, 557.

§ 250. Requisites of prescription.—The possession or use on which a prescriptive title is founded must not only be for the proper length of time,[1] but it must also be open, peaceable, continued, and unequivocal.[2] So it must be adverse, or of a nature to indicate that it is claimed as a right, and is not the effect of indulgence, or of any compact short of a grant.[3] And it should be with the acquiescence of the true owner;[4] and any fact which directly affects the probability of such acquiescence must be submitted to the jury, to assist them in determining whether the presumption of a grant should or should not be made.[5] But mere inattention on the part of the owner of land, to the fact that an easement in it is used by another, does not weaken the force of the presumption arising from lapse of time.[6]

1 § 248, *ante*.

2 Salle v. Primm, 3 Mo. 529; Rhodes v. Whitehead, 27 Tex. 304; Lawton v. Rivers, 2 McCord, 445; Ward v. Warren, 82 N. Y. 265; Jackson v. Burton, 1 Wend. 341; Connor v. Sullivan, 40 Conn. 26; 16 Am. Rep. 10; Bailey v. Appleyard, 8 Ad. & E. 161.

3 Grube v. Wells, 34 Iowa, 148; Musick v. Barney, 49 Mo. 458; Gayetty v. Bethune, 14 Mass. 53; 7 Am. Dec. 188; Branch v. Doane, 17 Conn. 402; Chalfin v. Malone, 9 Mon. B. 496; Garrett v. Jackson, 20 Pa. St. 331.

4 Powell v. Bagg, 8 Gray, 443; Edson v. Munsell, 10 Allen, 567; Pierre v. Fernald, 26 Me. 440. But compare Ward v. Warren, 82 N. Y. 265; Key v. Jennings, 66 Mo. 365.

5 Daniel v. North, 11 East, 374; Stevens v. Taft, 11 Gray, 33; Edson v. Munsell, 10 Allen, 568; Ricard v. Williams, 7 Wheat. 109, 110; and see Thompson v. Ploche, 44 Cal. 508; Peterson v. McCullough, 50 Ind. 35.

6 Reimer v. Stuber, 20 Pa. St. 458; and see Key v. Jennings, 66 Mo. 365.

§ 251. Prescription, how lost.—A prescription is lost by the destruction of the subject-matter of it;[1] but not by an alteration in the quality of the thing to which the prescription is annexed.[2] A prescription may also be lost by neglecting to claim or exercise it;[3] and it may be lost by unity of possession of as high and perdurable an estate in the thing claimed, and in the land out of which it is claimed.[4]

1 2 Greenl. Cruise, 232.

2 Cowper *v.* Andrews, Hob. 39; Luttrell's Case, 4 Rep. 86. Compare Renshaw *v.* Bean, 10 Eng. L. & Eq. 417; Saunders *v.* Newman, 1 Barn. & Ald. 253; Stein *v.* Bruden, 24 Ala. 130; Blanchard *v.* Baker, 8 Me. 253.

3 See Simpson *v.* Gutteridge, 1 Madd. 609; Carr *v.* Foster, 3 Ad. & E. N. S. 581; Wright *v.* Freeman, 5 Har. & J. 467; Casler *v.* Shipman, 35 N. Y. 533; § 147, *ante*.

4 2 Greenl. Cruise, 231; Canhan *v.* Fisk, 2 Cromp. & J. 126. Compare Manning *v.* Smith, 6 Conn. 289; Hazard *v.* Robinson, 3 Mason, 272; Coleman's Appeal, 62 Pa. St. 274; Plympton *v.* Converse, 42 Vt. 712.

§ 252. Adverse possession.—The adverse character of the possession which is requisite to establish title by prescription must be proved to the satisfaction of the jury, like any other fact.[1] The law presumes that where title is shown, the true owner is in possession until adverse possession is proved to begin;[2] and it does not begin until an actual entry is made, accompanied by a claim of title hostile to that of the true owner.[3] In order to make it a bar, strict proof is necessary that it was hostile in its inception, and had continued so for the requisite period.[4] It must be exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner;[5] and while such owner is able in law to assert and enforce his rights, and to resist such adverse claim if not well founded.[6] If the continuity be broken, either by fraud or a wrongful entry, the protection given by the Statute of Limitations is lost;[7] though if there be several adverse occupants, the last one may tack the possession of his predecessor to his, so as to make a continuous adverse possession for the period required by the statute, provided there is a privity of possession between such occupants.[8] If the adverse possession begins to run in the life-time of the ancestor, it continues to run, though the land descends to a person under a disability.[9] A tenant cannot set up his possession as adverse to his landlord, while the relation of landlord and tenant continues.[10] And no disseizin of the tenant of a particular estate and occupation under it, however long continued, will affect the right of the reversioner.[11] At common

law, no prescription could be maintained against the king;[12] but the lapse of sixty years is by statute a bar to any claim of the crown.[13] In New York adverse possession to bar the people must be continued forty years;[14] but the grantee of the people is barred in twenty years from his grant.[15] Mere possession of government land, though open, exclusive, and uninterrupted for twenty years, creates no impediment to its recovery by the government, or by one who within that period receives a conveyance from the government.[16] Twenty years' user under a license does not give a prescriptive right, since the possession is by consent, and not adverse.[17] In general, adverse possession of the character above described, under claim of title in fee, vests the title in the claimant so holding possession as effectually as though such title had been acquired by deed.[18]

1 Jackson *v.* Parker, 3 Johns. Ch. 124; Jackson *v.* Sharp, 9 Johns. 163; 6 Am. Dec. 627; Clap *v.* Bromagham, 9 Cowen, 530; Grube *v.* Wells, 34 Iowa, 148; Musick *v.* Barney, 49 Mo. 458; Russell *v.* Davis, 38 Conn. 562; Fitchburg Railroad *v.* Page, 131 Mass. 391.

2 Jackson *v.* Sharp, 9 Johns. 163; 6 Am. Dec. 627; Miner *v.* Mayor etc. 5 Jones & S. 171; Carson *v.* Burnet, 1 Dev. & B. 546; 30 Am. Dec. 143.

3 Jackson *v.* Parker, 3 Johns. Ch. 124; Miner *v.* Mayor etc. 5 Jones & S. 171; Thomas *v.* Babb, 45 Mo. 384.

4 Jackson *v.* Waters, 12 Johns. 365; Rung *v.* Shonberger, 2 Watts, 66; 26 Am. Dec. 95; Gay *v.* Moffit, 2 Bibb, 507. Compare Jackson *v.* Birner, 48 Ill. 203.

5 Gillespie *v.* Jones, 26 Tex. 343; Winslow *v.* Winslow, 52 Ind. 8; Arrington *v.* Liscom, 34 Cal. 365; Thompson *v.* Ploche, 44 Cal. 508; Union Canal Co. *v.* Young, 1 Whart. 410; 30 Am. Dec. 212; Wilson *v.* Henry, 40 Wis. 594; Gulf R. R. Co. *v.* Owen, 8 Kan. 409; § 248, *ante*.

6 Thompson *v.* Ploche, 44 Cal. 508; Dodge *v.* McClintock, 47 N. H. 387; Crispen *v.* Hannavan, 50 Mo. 536; Edson *v.* Munsell, 10 Allen, 567; Tickle *v.* Brown, 4 Ad. & E. 369.

7 San Francisco *v.* Fulde, 37 Cal. 349; and see Livingston *v.* Peru Iron Co. 9 Wend. 511; Pederick *v.* Searle, 5 Serg. & R. 240. It is a question for the jury to determine whether, in fact, the adverse possession has been continuous, or has been interrupted: Bowen *v.* Guild, 130 Mass. 121; O'Hara *v.* Richardson, 46 Pa. St. 385.

8 Shuffleton *v.* Nelson, 2 Sawy. 540; and see Schrack *v.* Zubler, 34 Pa. St. 38; Kruse *v.* Wilson, 79 Ill. 233; Christy *v.* Alford, 17 How. 601; Innis *v.* Miller, 10 Mart. 289; 13 Am. Dec. 330; Haynes *v.* Boardman, 119 Mass. 414; Alexander *v.* Stewart, 50 Vt. 87.

9 Jackson *v.* Moore, 13 Johns. 513; Fleming *v.* Griswold, 3 Hill, 85; Beeker *v.* Van Valkenburgh, 29 Barb. 319; Currier *v.* Yale, 3 Allen, 328. But see Everett *v.* Whitfield, 27 Ga. 159; Wilson *v.* Kilcannon, 4 Hayw. (Tenn.) 182.

10 Campbell v. Shipley, 41 Md. 81; Jackson v. Davis, 5 Cowen, 123. Compare Jackson v. Harsen, 7 Cowen, 323; People v. Trinity Church, 22 N. Y. 44.

11 Miller v. Ewing, 6 Cush. 34; Jackson v. Schoonmaker, 4 Johns. 390; Salmon v. Davis, 29 Mo. 176; and see Bedell v. Shaw, 59 N. Y. 50.

12 2 Greenl. Cruise, 264; and see Kennedy v. Townsley, 16 Ala. 239; Levasser v. Washburn, 11 Gratt. 572; Vickery v. Benson, 26 Ga. 590; Burgess v. Gray, 16 How. 65.

13 Stats. 21 Jac. 1, c. 2; 9 Geo. 3, c. 16. Adverse possession does not give title as against the sovereign power: Gardiner v. Miller, 47 Cal. 570.

14 La Frambois v. Jackson, 8 Cowen, 589; 18 Am. Dec. 463; and see People v. Arnold, 4 N. Y. 508; People v. Clarke, 10 Barb. 120.

15 La Frambois v. Jackson, 8 Cowen, 589; 18 Am. Dec. 463.

16 Oaksmith v. Johnston, 92 U. S. 343. See Spelman v. Curtenius, 12 Ill. 409; Wallis v. McGee, 4 Harr. (Del.) 108; Swearingen v. United States, 11 Gill & J. 373; Commonw. v. Hutchinson, 10 Pa. St. 466; Church v. Meeker, 34 Conn. 421.

17 Wiseman v. Lucksinger, 84 N. Y. 31; Babcock v. Utter, 1 Abb. Ct. App. 27.

18 Arrington v. Liscom, 34 Cal. 365; School Dist. v. Benson, 31 Me. 385; Wall v. Shindler, 47 Mo. 282. Compare Tyler v. Wilkinson, 4 Mason, 402; Ford v. Wilson, 35 Miss. 504; Sargent v. Ballard, 9 Pick. 256; Crook v. Glen, 30 Md. 55; Sherman v. Kane, 14 Jones & S. 310; Holmes v. Gay, 6 Bush, 47.

§ 253. Title by estoppel.—An estoppel is where a man is concluded by his own act or acceptance to say the truth.[1] It is so called because a man is excluded from saying anything, even the truth, against his own act or admission.[2] Its office is to preclude rights that cannot be asserted consistently with good faith and justice, and prevent wrongs for which there might be no adequate remedy.[3] It is a rule of law that a man shall always be estopped by his own deed, and shall not be allowed to aver or prove anything contrary to that which he has once solemnly alleged under seal.[4] If, therefore, it is manifest on the face of the conveyance, either by recital, admission, covenant, or in any other way, that the parties actually intended to convey and receive the identical estate and interest which is the subject-matter purporting to be conveyed by the instrument, they shall be held estopped from denying the operation of the deed according to its manifest intent.[5] Estoppels are said to be of two kinds: one personal in its character, operating as a personal rebutter, and preventing the grantor and those

claiming under him from asserting title or contradicting the intent and effect of his deed;[6] the other, of larger scope, carries with it all the qualities and attributes of the former, and also possesses the additional function of operating an actual transfer of an after-acquired interest.[7] Thus, if one having no title to land conveys the same with warranty to A, by a deed duly recorded, and he afterward acquires a title and conveys to B, the purchaser from B is estopped to aver that the grantor was not seized at the time of his conveyance to A, the first grantee.[8] The after-acquired title will feed the estoppel created by the conveyance to A, and conclude the grantor and all persons claiming under him;[9] and this is held to be so, although the deed to A was a deed poll.[10] The principle underlying an estoppel *in pais*, or equitable estoppel, is that it would be a fraud in a party to assert what his previous conduct and admissions have denied, when on the faith of that denial others have acted.[11] Thus a person, knowing that he himself has the title to a certain tract of land, nevertheless participates in inducing another to purchase it from a third person who has no title, will not be allowed afterward to assert his title, for the purpose of defeating that of such purchaser.[12] So if one man encourages another to settle on land and expend his money in improving it, he who offers the inducement shall not afterward allege anything against the settler's title.[13] So if the owner of land intentionally leads the public to believe that he has dedicated it to public use, he will be estopped from contradicting the dedication, to the prejudice of those whom he may have misled.[14] And if one who has the equitable title dedicates land to the public use, and afterwards acquires the legal title, he will be estopped from denying the dedication.[15] So the doctrine of estoppel has been applied to the adjustments of boundaries between contiguous estates;[16] to the use of a well on the land of another to which the party claimed right by user;[17] to prevent a party from asserting a lien

upon lands;[18] to the case of a claim to surplus moneys on the sale of lands;[19] and to preclude a party from asserting a secret equitable title as against the legal title.[20] But it is held that, under the statute of frauds, it is not permissible that an estoppel *in pais* should work a transfer of the legal title to land.[21]

1 Co. Litt. 352 *a*; and see Owen *v.* Bartholomew, 9 Pick. 520; Water's Appeal, 35 Pa. St. 527.

2 Welland Canal Co. *v.* Hathaway, 8 Wend. 483; 24 Am. Dec. 51; Titus *v.* Morse, 40 Me. 348.

3 Andrews *v.* Ætna Life Ins. Co. 12 N. Y. Week. Dig. 452; 85 N. Y. 334; Buckingham *v.* Hanna, 2 Ohio St. 551; Van Rensselaer *v.* Kearney, 11 How. 297; Carver *v.* Jackson, 4 Peters, 83.

4 Douglass *v.* Scott, 5 Ohio, 199; Doe *v.* Dowdall, 3 Houst. 369; 11 Am. Rep. 757; Sinclair *v.* Jackson, 8 Cowen, 536; Clark *v.* Baker, 14 Cal. 629. A grantor may be held to be estopped by delivering a deed to afterwards object that it is inoperative by reason of informality of execution: Taylor *v.* Sangrain, 1 Mo. App. 312.

5 Trevivan *v.* Lawrence, 1 Salk. 276; Goodtitle *v.* Bailey, Cowp. 597; Byrne *v.* Morehouse, 22 Ill. 603; Denn *v.* Cornell, 3 Johns. Cas. 506; Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35; Root *v.* Crack, 7 Pa. St. 380; Jefferson *v.* Howell, 1 Houst. 183; Stow *v.* Wyse, 7 Conn. 214; 18 Am. Dec. 99; Bowman *v.* Taylor, 2 Ad. & E. 278; Carpenter *v.* Buller, 8 Mees. & W. 212; Kenny *v.* Aitken, 12 N. Y. Week. Dig. 127; Fredericks *v.* Davis, 3 Mont. 251.

6 See Doe *v.* Oliver, 5 M. & Ry. 202; Helps *v.* Hereford, 2 Barn. & Ald. 242; Jackson *v.* Bradford, 4 Wend. 619; White *v.* Patten, 24 Pick. 324; Taylor *v.* Shufford, 4 Hawks, 116; 15 Am. Dec. 512.

7 Doe *v.* Dowdall, 3 Houst. 369; 11 Am. Rep. 761; McCusker *v.* McEvey, 9 R. I. 528; 11 Am. Rep. 295; Mickles *v.* Townsend, 18 N. Y. 575; Dudley *v.* Caldwell, 19 Conn. 218; Helps *v.* Hereford, 2 Barn. & Ald. 242.

8 White *v.* Patten, 24 Pick. 324; Chamberlain *v.* Meeder, 16 N. H. 381; Baxter *v.* Bradbury, 20 Me. 260; Goodson *v.* Beacham, 24 Ga. 150; Doe *v.* Dowdall, 3 Houst. 369; 11 Am. Rep. 761; Brown *v.* M'Cormick, 6 Watts, 60.

9 McCusker *v.* McEvey, 9 R. I. 528; 11 Am. Rep. 295; Doe *v.* Oliver, 5 M. & Ry. 202; and see House *v.* McCormick, 57 N. Y. 310; Burtners *v.* Keran, 24 Gratt. 43.

10 McCusker *v.* McEvey, 9 R. I. 528; 11 Am. Rep. 295.

11 Horn *v.* Cole, 51 N. H. 287; 12 Am. Rep. 111; Simpson *v.* Pearson, 31 Ind. 1; and see Zuchtmann *v.* Roberts, 109 Mass. 53; 12 Am. Rep. 663; Chandler *v.* White, 84 Ill. 435; Brant *v.* Virginia Coal etc. Co. 93 U. S. 326; Chapman *v.* O'Brien, 2 Jones & S. 524; Holmes *v.* Crowell, 73 N. C. 613; Cairncross *v.* Lorimer, 3 Macq. 829; Bean *v.* Pettingill, 7 Rob. (N. Y.) 7. But a party can never be estopped by an act that is illegal and void: Mattox *v.* Hightshue, 39 Ind. 95.

12 Sherrill *v.* Sherrill, 73 N. C. 8; Gray *v.* Bartlett, 20 Pick. 193; and see Snodgrass *v.* Ricketts, 13 Cal. 359; Winchell *v.* Edwards, 57 Ill. 41; Titus *v.* Morse, 40 Me. 348; Storrs *v.* Barker, 6 Johns. Ch. 166; 10 Am. Dec. 316; Moore *v.* Bowman, 47 N. H. 494; Davidson *v.* Silliman, 24 La. An. 225; Pickard *v.* Sears, 6 Ad. & E. 469.

13 McKelvy *v.* Trubey, 4 Watts & S. 323; Campbell *v.* Mays, 38 Iowa,

9; Henderson v. Overton, 2 Yerg. 394; 24 Am. Dec. 492. Compare Beauplanᵈ v. McKeen, 28 Pa. St. 124; Rochester Ins. Co. v. Martin, 13 Minn. 59; Jamison v. Cornell, 3 Hun, 557.

14 Hobbs v. Lowell, 19 Pick. 409; State v. Trask, 6 Vt. 355; Noyes v. Ward, 19 Conn. 250; Boyce v. Kalbaugh, 47 Md. 334; 28 Am. Rep. 464.

15 Mankato v. Willard, 13 Minn. 13.

16 Laverty v. Moore, 32 Barb. 351; Hoxey v. Clay, 20 Tex. 582; Clark v. Hulsey, 54 Ga. 608; and see Stanwood v. McLellan, 48 Me. 275; Rutherford v. Tracey, 48 Mo. 325; 8 Am. Rep. 104; Gove v. White, 23 Wis. 282; Stewart v. Carleton, 31 Mich. 270; Halloran v. Whitcomb, 43 Vt. 306.

17 Stevens v. Dennett, 51 N. H. 324; and see Pool v. Lewis, 41 Ga. 162.

18 Blackwood v. Jones, 4 Jones Eq. 56.

19 Water's Appeal, 35 Pa. St. 523.

20 Winchell v. Edwards, 57 Ill. 41; and see House v. McCormick, 57 N. Y. 310.

21 Hayes v. Livingston, 34 Mich. 384; 22 Am. Rep. 533; and see Davis v. Davis, 26 Cal. 23; Mills v. Graves, 38 Ill. 466; Ryder v. Flanders, 30 Mich. 344; Doe v. Walters, 16 Ala. 714. But see Bigelow v. Foss, 59 Me. 162; Brown v. Brown, 30 N. Y. 519; McCune v. McMichael, 29 Ga. 312; Shaw v. Beebe, 35 Vt. 205; DeHerques v. Marti, 85 N. Y. 609.

§ 254. Accretion.—If portions of soil are added to real estate already possessed, through the operation of natural causes, or by slow and imperceptible accretion, the owner of the land to which the addition has been made has a perfect title to that addition, and this is called title by accretion.[1] Alluvion is the addition made to land by the washing of the sea, a navigable river, or other stream, whenever the increase is so gradual that it cannot be perceived in any one moment of time.[2] And the right to future alluvial formations is a right inherent in the property, and an essential attribute of it;[3] the title thereto is the result of natural law, in consequence of the local situation of the land.[4] And it is held that the proprietor of lands bounded by a stream is entitled to all accretions thereto, caused by the deposition of alluvion thereon, without regard to the question whether such accretions were formed solely by natural causes, or by such causes influenced by the artificial works of others, and without regard to the question whether such stream is navigable or not.[5] But all islands, and other increase, if sudden and considerable, arising in the sea and in navigable streams, belong to the sovereign or the

State.[6] If an island is formed in a stream not navigable, so as to divide the channel and lie partly on each side of the thread of the stream, it will be divided between the riparian proprietors on the opposite sides of the stream, according to the original thread thereof.[7] Seaweed thrown upon land by the sea is considered an accretion, and belongs to the owner of the soil.[8]

1 See Lovingston *v.* County of St. Clair, 64 Ill. 56; 16 Am. Rep. 523.

2 Trustees etc. *v.* Dickinson, 9 Cush. 551; Lovingston *v.* County of St. Clair, 16 Am. Rep. 527, n.; 2 Blackst. Com. 262.

3 Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122; King *v.* Ld. Yarborough, 3 Barn. & C. 91; 2 Bligh N. S. 147.

4 Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122; Lovingston *v.* County of St. Clair, 16 Am. Rep. 527, n.; 23 Wall. 68; Aff'g, S. C. 64 Ill. 56.

5 Lovingston *v.* County of St. Clair, 64 Ill. 56; 16 Am. Rep. 523; 23 Wall. 68; Adams *v.* Frothingham, 3 Mass. 352; 3 Am. Dec. 151; Banks *v.* Ogden, 2 Wall. 57; Warren *v.* Chambers, 25 Ark. 120; Middleton *v.* Pritchard, 3 Scam. 510; and see Atty.-Gen. *v.* Chambers, 4 De Gex & J. 55; Ford *v.* Lacy, 7 Hurl. & N. 151; New Orleans *v.* United States, 10 Peters, 662; King *v.* Ld. Yarborough, 3 Barn. & C. 91.

6 2 Blackst. Com. 262. If land once submerged by the sea shall again be left by the reflex and recess of the sea, the owner shall again have his land as before, if he can make out where and what it was: Murphy *v.* Norton, 61 How. Pr. 197.

7 Trustees etc. *v.* Dickinson, 9 Cush. 548; Deerfield *v.* Arms, 17 Pick. 41; 28 Am. Dec. 276; People *v.* Canal Appraisers, 13 Wend. 355; Girand *v.* Hughes, 1 Gill & J. 249.

8 Emans *v.* Turnbull, 2 Johns. 313; 3 Am. Dec. 427. See § 12, *ante*.

§ 255. Escheat.—The mode of acquiring title by escheat, as known to the English law, is of strictly feudal character, and does not exist in the United States.[1] It was an incident of feudal tenure, whereby, upon the death of the tenant without heirs, the estate resulted back to the lord of the fee.[2] So the English doctrine of escheats arising in consequence of a person being attainted of treason or felony is done away with in this country.[3] And the only ground of escheat practically known to our laws is where the owner dies intestate, leaving no inheritable blood;[4] in which case the lands escheat to the people, or fall back into the common ownership of the State.[5] But generally, a process known as an "inquest of office," or "office found," must be instituted and carried on in

the name of the State, in order to complete its title to the escheated lands.[6] And the State takes the title which the party had, and none other, and takes it in the plight and extent by which he held it.[7] If a *cestui que trust* dies intestate, without heirs, the trustee will hold an absolute estate in the property, discharged of the trust.[8]

1 See 4 Kent Com. 424; Ringgold v. Mallot, 1 Har. & J. 299.

2 2 Greenl. Cruise, 193, 194; 3 Dane Abr. 140.

3 U. S. Const. art. 3, § 3. As to the effect of the Confiscation Act (12 Stats. at Large, 589), see Wallach v. Van Riswick, 92 U. S. 202; Semmes v. U. S. 91 U. S. 21; Day v. Micon, 18 Wall. 156.

4 Sewall v. Lee, 9 Mass. 363; Bradley v. Dwight, 62 How. Pr. 300.

5 4 Kent Com. 424; Bradley v. Dwight, 62 How. Pr. 300; People v. Conklin, 2 Hill, 67; Wallace v. Harmstad, 44 Pa. St. 501; Matthews v. Ward, 10 Gill & J. 443; Jackson v. Jackson, 7 Johns. 214; Scott v. Cohen, 2 Nott & McC. 293; M'Caughal v. Ryan, 27 Barb. 376; Nettles v. Cummings, 9 Rich. Eq. 440; Montgomery v. Dorion, 7 N. H. 475; Donovan v. Pitcher, 53 Ala. 411; 25 Am. Rep. 634; Sands v. Lynham, 27 Gratt. 291; 21 Am. Rep. 348. The State takes, not as heir, but because there are no heirs: State v. Ames, 23 La. An. 69.

6 See 2 Wash. Real Prop. 444; Commonw. v. Hite, 6 Leigh, 588; 29 Am. Dec. 226; People v. Folsom, 5 Cal. 373; Matter of Desilver, 5 Rawle, 111; 28 Am. Dec. 645. But see 4 Kent Com. 424; M'Caughal v. Ryan, 27 Barb. 376; Holliman v. Peebles, 1 Tex. 673; Den v. O'Hanlon, 1 N. J. 582; Crane v. Reeder, 21 Mich. 24; 4 Am. Rep. 430.

7 4 Kent Com. 427; Booland v. Dean, 4 Mason, 174.

8 Matthews v. Ward, 10 Gill & J. 443. See Burgess v. Wheate, 1 Black. W. 123; 1 Eden, 177.

§ 256. Eminent domain.—Title to property is always held subject to the right of eminent domain;[1] that is, upon the implied conidtion that it must be surrendered to the government, either in whole or in part, when the public necessities, evinced according to the established forms of law, demand it.[2] The right is one appertaining to the sovereignty of the State, and may be freely exercised on proper occasions, upon allowing just compensation to the owner of the land taken.[3] And the legislature may authorize corporations or individuals, as well as agents of the government, to exercise the right.[4] But while the State, by virtue of its sovereignty, has the power to appropriate private property for public use, for the purpose of promoting the general welfare,[5] it has no right to take one man's property and give it to another.[6] And

private property cannot be taken for private use, even though compensation be made.[7] The right is not a continuing one, unless so declared, and it is strictly construed.[8] Ordinarily, the interest vested in the public is only an easement, and when the use is discontinued and abandoned, the land reverts to the original owner.[9] But the legislature may authorize the entire interest of the owner to be taken, upon the payment of a just compensation, if it deem the public exigency demands it.[10]

1 Gilmer *v.* Lime Point, 18 Cal. 229; Bailey *v.* Mittenberger, 31 Pa. St. 37; and see Boone Corp. § 91.

2 People *v.* New York, 32 Barb. 102. The right of eminent domain in no sense depends upon any contract between the owner and the public: Lamb *v.* Shottler, 54 Cal. 319.

3 Weer *v.* St. Paul etc. R. R. Co. 13 Minn. 155; Ash *v.* Cummings, 50 N. H. 591; White *v.* Nashville etc. R. R. Co. 7 Heisk. 518; Scudder *v.* Trenton etc. Co. 1 Saxt. Ch. 694; 23 Am. Dec. 756.

4 In re Fowler, 53 N. Y. 60; Boone Corp. § 92; Beekman *v.* Saratoga R. R. Co. 3 Paige, 45; 22 Am. Dec. 679.

5 Richardson *v.* Vt. Cent. R. R. Co. 25 Vt. 465; Matter of Bloomfield Gas Light Co. *v.* Richardson, 63 Barb. 437; Cooper *v.* Williams, 4 Ohio, 253; 22 Am. Dec. 745.

6 Brown *v.* Beatty, 34 Miss. 227; People *v.* White, 11 Barb. 26; Harding *v.* Goodlett, 3 Yerg. 40; 24 Am. Dec. 546. The right of eminent domain extends to corporate franchises, and by virtue of that right the bridge of a corporation can be taken for public use, and made a free bridge: Re Towanda Bridge Co. 91 Pa. St. 216.

7 Scudder *v.* Trenton etc. Co. 1 Saxt. Ch. 694; 23 Am. Dec. 756; Wild *v.* Deig, 43 Ind. 455; 13 Am. Rep 399; Osborn *v.* Hart, 24 Wis. 89; 1 Am. Rep. 161.

8 People *v.* White, 11 Barb. 26; and see Boone Corp. §§ 94, 96.

9 See Boone Corp. §§ 95, 250; Livermore *v.* Jamaica, 23 Vt. 361; People *v.* White, 11 Barb. 26; Malone *v.* Toledo, 34 Ohio St. 541.

10 Boone Corp. § 95; De Varaigne *v.* Fox, 2 Blatchf. 95; Heyward *v.* Mayor etc. 7 N. Y. 314.

§ 257. Public grant.—The mode of creating a title in an individual to lands previously belonging to the government is by public grant.[1] The title in such case is evidenced by an instrument called a patent, which, when regularly and properly issued, invests the party with a complete, perfect title.[2] The patent is conclusive evidence of the validity of the original grant, and of its recognition and confirmation, and of the survey and its conformity with the confirmation, and of the relinquish-

ment to the patentee of all interest of the government in the land.[3] And while it remains in force it is conclusive as against a junior patent for the same lands.[4] And it is held that recitals in a patent are evidence against a person in possession of the land without title.[5] So the action of the land officers in the Land Department of the General Government, in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, in all courts and in all forms of judicial proceedings, where the legal title must control.[6] But courts of equity have power to reform or correct patents, or to declare them void, or to grant other appropriate relief in cases of fraud, mistake, or other special ground of equity jurisdiction, when private rights are invaded.[7] A patent is not necessary in all cases to confer a legal title to soil, of which the government is the proprietor, and an act of Congress may divest the United States at once of all property in a portion of the public lands, and transfer it to an individual.[8] And there are no particular terms necessary to constitute a grant by the legislature.[9] All the lands in the Territories, in the first instance, belong exclusively to the United States, subject to their absolute and discretionary disposal;[10] and no State or Territory has a right to interfere with this exclusive control.[11]

1 See 2 Wash. Real Prop. 517; Perkins *v.* Blood, 36 Vt. 273; Coe *v.* Bradley, 49 Me. 388; Doe *v.* Beardsley, 2 McLean, 412; Rice *v.* Railroad Co. 1 Black, 358; Innes *v.* Crawford, 2 Bibb, 412; Lansing *v.* Smith, 4 Wend. 9; 21 Am. Dec. 89.

2 Patterson *v.* Tatum, 3 Sawy. 164; Gibson *v.* Chouteau, 13 Wall. 92; Green *v.* Liter, 8 Cranch, 229; Goodlet *v.* Smithson, 5 Port. 245; 30 Am. Dec. 561; Hoofnagle *v.* Anderson, 8 Cranch, 229; Boardman *v.* Reed, 6 Peters, 328; Grignon *v.* Astor, 2 How. 319; Doe *v.* McKilvain, 14 Ga. 252; Astrom *v.* Hammond, 3 McLean, 107; Roods *v.* Symmes, 1 Ohio, 281; 13 Am. Dec. 621. See McGarrahan *v.* Mining Co. 96 U. S. 316. A patent issued without authority of law, or by an officer unauthorized to grant it, is no evidence of title: Todd *v.* Fishen, 26 Tex. 239.

3 Boggs *v.* Merced Co. 14 Cal. 361; Luse *v.* Clark, 18 Cal. 535; and see Maxey *v.* O'Connor, 23 Tex. 238; Harris *v.* McKissack, 34 Miss. 464.

4 Jackson *v.* Lawton, 10 Johns. 24; 6 Am. Dec. 311; Smelting Co. *v.* Kemp, 104 U. S. 636.

5 Boatner *v.* Ventress, 8 Martin N. S. 644; 20 Am. Dec. 266; Bagnell

v. Broderick, 13 Peters, 433; Steiner v. Coxe, 4 Pa. St. 28; Downing v. Gallagher, 2 Serg. & R. 455; McGarrahan v. New Idria Min. Co. 49 Cal. 331.

6 Johnson v. Towsley, 13 Wall. 72; Garland v. Wynn, 20 How. 6; Moore v. Robbins, 96 U. S. 535; Powers v. Leith, 53 Cal. 712; Lamont v. Stinson, 3 Wis. 545; Boyce v. Dunn, 29 Mich. 146; State v. Bachelder, 7 Minn. 121; Shepley v. Cowan, 91 U. S. 340; Quinby v. Conlan, 104 U. S. 426.

7 Johnson v. Towsley, 13 Wall. 72; Moore v. Robbins, 96 U. S. 530; Bisson v. Curry, 35 Iowa, 72; United States v. Throckmorton, 98 U. S. 61; Lyrte v. Arkansas, 22 How. 203. Compare Sacramento Sav. Bank v. Hynes, 50 Cal. 195; Quinby v. Conlan, 104 U. S. 426; Smelting Co. v. Kemp, 104 U. S. 626.

8 Boatner v. Ventress, 8 Martin N. S. 644; 20 Am. Dec. 266; and see Bloomer v. Stolley, 5 McLean, 158; Terrett v. Taylor, 9 Cranch, 50; Strother v. Lucas, 12 Peters, 454; Hall v. Jarvis, 65 Ill. 302.

9 Ward v. Bartholomew, 6 Pick. 409; Proprietors etc. v. Permit, 5 N. H. 230; 20 Am. Dec. 580; and see Fletcher v. Peck, 6 Cranch, 87; Sargent v. Simpson, 8 Me. 148.

10 Irvine v. Marshall, 20 How. 558; Johnson v. McIntosh, 8 Wheat. 543; Pratt v. Brown, 3 Wis. 603. See Worcester v. Georgia, 6 Peters, 543; Doe v. Beardsley, 2 McLean, 412.

11 Irvine v. Marshall, 20 How. 558; Gibson v. Chouteau, 13 Wall. 92; Acceptance of a patent for lands, issued by the government is essential to its taking effect: Leroy v. Jamison, 3 Sawy. 369.

§ 258. Pre-emption.—Pre-emption is a right secured by law to *bona fide* settlers on the public lands, giving them a preference over others in the purchase of such land.[1] But a mere entry by a settler upon land, with continued occupancy and improvement thereof, gives no vested interest in it.[2] His settlement protects him from intrusion or purchase by others, but confers no right against the government.[3] He has no title or estate in the land which he can sell or encumber;[4] nor is a pre-emption right an estate of which a widow can be endowed.[5] The land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement, and has paid the purchase-money.[6] But when the purchase-money has been paid, and the receipt of the proper land officer has been given to the purchaser, he obtains a vested right in the land.[7] And a pre-emptive right to enter lands acquired by an intestate will descend to his heirs.[8]

1 U. S. Rev. Stats. ch. 4; Craig v. Tappan, 2 Sand. Ch. 78; Lyrte v. Arkansas, 9 How. 328; Hosmer v. Wallace, 97 U. S. 575; Quinby v. Conlan, 104 U. S. 420.

2 Whitney *v.* Frisbie, 8 Wall. 189. See Atherton *v.* Fowler, 96 U. S. 513; Pickard *v.* Kelley, 52 Cal. 89.

3 Whitney *v.* Frisbie, 9 Wall. 189.

4 Craig *v.* Tappan, 2 Sand. Ch. 78. Compare Delauney *v.* Burnett, 4 Gilm. 454.

5 Davenport *v.* Farrar, 1 Scam. 314.

6 Brown *v.* Throckmorton, 11 Ill. 529; Busch *v.* Donohue, 31 Mich. 482; Grand Gulf R. R. *v.* Bryan, 8 Smedes & M. 468; Hutton *v.* Frisbie, 27 Cal. 475; Bower *v.* Higbee, 9 Mo. 261; Whitney *v.* Frisbee, 9 Wall. 189, 195; Yosemite Valley Case, 15 Wall. 77; Henry *v.* Welch, 4 La. 547; 23 Am. Dec. 490.

7 Frisbie *v.* Whitney, 9 Wall. 187.

8 Johnson *v.* Collins, 12 Ala. 322. Equity will recognize no resulting trust in favor of one who enters land in the name of another to evade the pre-emption laws: Higgins *v.* Higgins, 55 Mo. 346.

§ 259. Land warrant.—Land warrants by the laws of some of the States are not mere chattels, but are regarded as a kind of inchoate title to lands, and descend to heirs.[1] An entry upon land under a land warrant can be made only in the name of the person to whom it was issued, or in the name of his assignee.[2] The assignee of a land warrant fraudulently procured from the government has no higher legal rights than the warrantee;[3] and the government, though the warrant be regular on its face, is not estopped to deny its validity, although it be in the hands of an assignee for value and without notice.[4]

1 See Reeder *v.* Barr, 4 Ohio, 458; Brush *v.* Ware, 15 Peters, 93. But see Moody *v.* Hutchinson, 44 Me. 57.

2 Galt *v.* Galloway, 4 Peters, 332; and see Thomas *v.* Boerner, 25 Mo. 27; Fort *v.* Wilson, 3 Iowa, 153.

3 Bronson *v.* Keokuk, 3 Dill. 490.

4 Bronson *v.* Keokuk, 3 Dill. 490.

§ 260. By execution.—The title derived from the sale by some officer of the law, under an execution, owes its origin to modern legislation, and was unknown to the common law.[1] The acquisition of title in this way is a proceeding *in invitum*, the requisites of which are prescribed by positive law;[2] and a strict compliance with these requisites is indispensable to a transfer of title.[3] Statutory provisions on the subject vary in the different States, and the statutes of the particular State should be

consulted.[4] It is held in the New England States, that where the land of one person is transferred to another under an execution, it must appear by the officer's return, either expressly or by necessary inference, that he has proceeded according to the statute, and if it does not so appear, the defect cannot be supplied by evidence *aliunde*.[5] It is generally required of the creditor that he resort, in the first instance, to the personal estate of the debtor, as the proper and primary fund, and to look only to the real estate after the former is exhausted and found insufficient.[6] But the neglect of the officer to do so has been held not to affect the purchaser at an execution sale.[7] Nor is such purchaser affected, though the execution be subsequently quashed;[8] nor even if the judgment was paid, if no satisfaction appeared on record, and he was a purchaser without notice.[9] And where land is regularly sold on execution, a reversal of the judgment afterwards will not divest the title of the purchaser.[10] But the rule of *caveat emptor* applies, and there is no warranty of title.[11] In those States in which the sheriff sells the land, he must execute a deed thereof to the purchaser in the mode prescribed by statute;[12] and, unless otherwise provided by statute, the purchaser acquires no right of entry upon the land until he obtains a deed.[13] But in many of the States, a sale of lands by a sheriff, under an execution, is held not to be within the statute of frauds.[14] The sale is not void, but may be enforced by the purchaser against the sheriff, and the giving of a deed compelled.[15] But the purchaser acquires no such title to the land as may be sold on execution against him, until a valid deed is executed.[16] A deed executed by the sheriff before the expiration of the period of redemption fixed by law is inoperative, because at the time when the deed was executed he had no authority to make it.[17]

1 See Duvall *v.* Waters, 1 Bland Ch. 569; 18 Am. Dec. 350; Jones *v.* Jones, 1 Bland Ch. 443; 18 Am. Dec. 327; Bruch *v.* Lantz, 2 Rawle, 392; 21 Am. Dec. 458; Hobart *v.* Frisbie, 5 Conn. 592; Parker *v.* Rule, 9 Cranch, 64. See also Wms. Real Prop. 66, *et seq.*; Stats. 1, 2 Vict. c. 110; 2, 3 Vict. c. 11.

2 Mitchell v. Kirtland, 7 Conn. 231.

3 Cox v. Joiner, 4 Bibb, 94; Williams v. Jones, 1 Bush, 621; Kintz v. Long, 30 Pa. St. 501; Pickering v. Reynolds, 111 Mass. 83; Emmons v. Williams, 28 Tex. 776; Dickerman v. Burgess, 20 Ill. 266; Dehaven's Appeal, 75 Pa. St. 237; Tyler v. Wilkerson, 27 Ind. 450.

4 See 4 Kent Com. 429, *et seq.*; 1 Greenl. Cruise, 539, n.

5 Jackson v. Woodman, 29 Me. 266; Avery v. Bowman, 39 N. H. 392; Sleeper v. Newbury Seminary, 19 Vt. 451; Litchfield v. Cudworth, 15 Pick. 28; Bissell v. Mooney, 33 Conn. 411; Wilcox v. Emerson, 10 R. I. 270; 14 Am. Rep. 683.

6 4 Kent Com. 430; and see Garnet v. Macon, 6 Call, 608; Hawley v. James, 5 Paige, 317; Murdock v. Hunter, 1 Brock. 135.

7 Frakes v. Brown, 2 Blackf. 295; and see Spencer v. Champion, 13 Conn. 11.

8 Doe v. Snyder, 3 How. (Miss.) 66.

9 Jackson v. Cadwell, 1 Cowen, 622. See Sweeney v. Craddocks, 6 Mon. B. 590.

10 Feger v. Keefer, 6 Watts. 297. A purchaser of property who takes title under a decree or judgment of a court that was without jurisdiction to grant it acquires no title, and any party having a valid title, but out of possession, may bring ejectment: Weldersum v. Nauman, 62 How. Pr. 369.

11 Saunders v. Pate, 4 Rand. 8; Hand v. Grant, 10 Smedes & M. 514; Neal v. Gillaspy, 56 Ind. 451; 26 Am. Rep. 37; Lang v. Waring, 25 Ala. 625; Roberts v. Hughes, 81 Ill. 130; 25 Am. Rep. 270; Wood v. Lewis, 14 Pa. St. 9. The purchaser must accept the debtor's position as to liabilities legal or equitable existing either as encumbrances or as incidents of the title: Bryan v. Sharp, 4 Cal. 349; Carew v. Love, 30 Ala. 577; Polhemus v. Empson, 27 N. J. Eq. 190; Morton v. Welborn, 21 Tex. 772; Frost v. Yonkers Savings Bank, 70 N. Y. 553; 26 Am. Rep. 627.

12 See Hawley v. Cramer, 4 Cowen, 717; Harrison v. Kramer, 3 Iowa, 543; Anthony v. Wessel, 9 Cal. 103.

13 Simonds v. Catlin, 2 Caines, 61; Young v. Withers, 8 Dana, 165; and see Allen v. Moss, 27 Mo. 354.

14 Hadden v. Johnson, 7 Ind. 394; Hart v. Rector, 13 Mo. 497; Boring v. Lemmon, 5 Har. & J. 223; Elfe v. Gadsden, 2 Rich. 373; and see Moorhead v. Pearce, 2 Ycates, 456. In New York, no title will pass to a purchaser of lands at sheriff's sale, unless some deed or memorandum thereof signed by the sheriff is given: Jackson v. Catlin, 2 Johns. 248.

15 People v. Irvin, 14 Cal. 428.

16 Hagerman v. Jackson, 1 Wend. 502; Kidder v. Orcutt, 40 Me. 589; Bowman v. People, 82 Ill. 246; Hinsdale v. Thornton, 74 N. C. 167. But compare Morrison v. Wurtz, 7 Watts, 437; Stump v. Henry, 6 Md. 209.

17 Gorham v. Wing, 10 Mich. 486; Bernal v. Gleim, 33 Cal. 668. A purchaser of land at a sheriff's sale upon execution takes such an estate therein as the debtor had at the time of sale, and none other: Scott v. Purcell, 7 Blackf. 66; Hildreth v. Sands, 2 Johns. Ch. 35. In order to perfect his title, he must pay off all prior liens of every kind: Isler v. Colgrove, 75 N. C. 334; and see Pindall v. Trevor, 30 Ark. 249; Polhemus v. Empson, 27 N. J. Eq. 190.

§ 261. Tax deed.—Another statutory mode of divesting the title of one owner of lands, and creating a title to the same lands in another, is by a sale of the lands

for the payment of taxes, by some officer duly authorized.[1] But the power to sell land for taxes is a mere naked one, not coupled with an interest, and the law requires that every prerequisite to the exercise of that power must precede its exercise;[2] the agent must strictly pursue the power, or his act will not be sustained by it.[3] And the party claiming title under the power is chargeable with notice of every irregularity in the proceedings of the officers, and the burden is upon him to show the faithful execution of the power.[4] He must establish affirmatively that the officers acted strictly in conformity with the law;[5] and the proof must be made *aliunde*, and not by the deed itself.[6] Neither the deed nor its recitals are even *prima facie* evidence of compliance with the statutory requisites.[7] But in many of the States, the stringency of the common law in this respect has been relaxed by statute, so far as to make tax deeds *prima facie* evidence of the regularity of the preliminary proceedings, as well as of the sale itself.[8] The statute raises a presumption in favor of the validity of the proceedings, and shifts the burden of proof to the party contesting the sale.[9] But this presumption does not affect in the least the substantial rights of the parties, and a tax deed with a *prima facie* presumption of validity in its favor is no better when proved to be void than a tax deed that has no such presumption in its favor.[10] And an act of the legislature, declaring a tax deed *conclusive* evidence that all of the essential requirements of the law regulating the exercise of the taxing power were complied with, is held to be unconstitutional;[11] but it is otherwise of an act which declares the deed conclusive evidence of the regularity of the sale only.[12] If land not taxable is levied upon and sold for taxes, the tax deed is absolutely void,[13] and the Statute of Limitations does not run in favor of the holder of the deed from the date thereof, and against the original owner of the land or his grantee.[14] But where the officer gives an imperfect or

informal tax deed, which does not pass the title, he may, on his own motion, give a second deed, correct in fact and regular in form.[15]

1 See Atkins *v.* Kinnan, 20 Wend. 249; Boardman *v.* Bourne, 20 Iowa, 134; Polk *v.* Rose, 25 Md. 153; Stierlin *v.* Daley, 37 Mo. 483; Colman *v.* Anderson, 10 Mass. 105; Corwin *v.* Merritt, 3 Barb. 343; People *v.* Mayor etc. 4 N. Y. 424.

2 Jackson *v.* Shepard, 7 Cowen, 68; 17 Am. Dec. 502; Ronkendorff *v.* Taylor, 4 Peters, 349; Williams *v.* Peyton, 4 Wheat. 77; Scales *v.* Alvis, 12 Ala. 617; Harrington *v.* Worcester, 6 Allen, 576.

3 Jackson *v.* Shepard, 7 Cowen, 88; 17 Am. Dec. 502; Sampson *v.* Marr, 7 Baxt. 486. A tax collector's deed based upon an invalid sale passes no title: Forster *v.* Forster, 129 Mass. 559.

4 Norris *v.* Russell, 5 Cal. 249; Bush *v.* Davison, 16 Wend. 550; Sharp *v.* Speir, 4 Hill, 86; Polk *v.* Rose, 25 Md. 153; Denning *v.* Smith, 3 Johns. Ch. 344; Sutton *v.* Calhoun, 14 La. An. 209; Langdon *v.* Poor, 20 Vt. 15.

5 Polk *v.* Rose, 25 Md. 153; Thatcher *v.* Powell, 6 Wheat. 119; Jackson *v.* Esty, 7 Wend. 148; Ferris *v.* Coover, 10 Cal. 589; Worthing *v.* Webster, 45 Me. 270. If land be sold for taxes, a part of which are valid and a part illegal, the whole sale and the tax deed will be void: Wills *v.* Austin, 53 Cal. 152.

6 Jackson *v.* Shepard, 7 Cowen, 88; 17 Am. Dec. 502; Jesse *v.* Preston, 5 Gratt. 120; Jackson *v.* Roberts, 11 Wend. 432; Phillips *v.* Sherman, 61 Me. 548; Reed *v.* Field, 15 Vt. 672.

7 Brown *v.* Wright, 17 Vt. 97; Hill *v.* Draper, 10 Barb. 463; Shearer *v.* Corbin, 1 McCrary (C. C.) 306; Hoyt *v.* Dillon, 19 Barb. 644; Jackson *v.* Shepard, 7 Cowen, 88; 17 Am. Doc. 502; Weyand *v.* Tipton, 5 Serg. & R. 332; and see McAllister *v.* Shaw, 69 Me. 348. But compare Currie *v.* Fowler, 5 Marsh J. J. 145; Allen *v.* Robinson, 3 Bibb, 326.

8 Ferris *v.* Coover, 10 Cal. 589; Person *v.* O'Neal, 32 La. An. 228; O'Grady *v.* Barnisbel, 23 Cal. 287; Madland *v.* Benland, 24 Minn. 372; Johnson *v.* Elwood, 53 N. Y. 431; Stewart *v.* McSweeny, 14 Wis. 468; Hart *v.* Smith, 44 Wis. 213; Bowman *v.* Cockrill, 6 Kan. 311; Gardenhire *v.* Mitchell, 21 Kan. 83; Stanberry *v.* Sillon, 13 Ohio St. 571; State *v.* Herron, 29 La. An. 848; Lee *v.* Jeddo Coal Co. 84 Pa. St. 74; and see Steeple *v.* Downing, 60 Ind. 478.

9 Taylor *v.* Miles, 5 Kan. 498; 7 Am. Rep. 558; Johnson *v.* Elwood, 53 N. Y. 431; Biscoe *v.* Coalter, 18 Ark. 423; Williams *v.* Kirkland, 13 Wall. 306; and see Easton *v.* Savery, 44 Iowa, 654; Daniels *v.* Burso, 40 Ill. 307.

10 Taylor *v.* Miles, 5 Kan. 498; 7 Am. Rep. 558.

11 McCready *v.* Sexton, 29 Iowa, 356; 4 Am. Rep. 214; Gould *v.* Thompson, 45 Iowa, 450; Abbott *v.* Lindenbower, 42 Mo. 162; 46 Mo. 291; Quinlon *v.* Rogers, 12 Mich. 168; Curry *v.* Hinman, 11 Ill. 428; People *v.* Mitchell, 45 Barb. 212.

12 Martin *v.* Cole, 38 Iowa, 141; Stead *v.* Cource, 4 Cranch, 303; Callanan *v.* Hurley, 93 U. S. 387; Doughty *v.* Hope, 1 N. Y. 79; 3 Denio, 595.

13 Taylor *v.* Miles, 5 Kan. 498; 7 Am. Rep. 558.

14 Taylor *v.* Miles, 5 Kan. 498; 7 Am. Rep. 558; and see Lain *v.* Shepardson, 18 Wis. 59; Moore *v.* Brown, 11 How. 414; Lefingwell *v.* Warren, 2 Black, 599.

15 McCready *v.* Sexton, 29 Iowa, 356; 4 Am. Rep. 214; Woodman *v.* Clapp, 21 Wis. 350; 21 Wis. 355; Maxcy *v.* Clabaugh, 1 Gilm. 26; and see

Gibson *v.* Bailey, 9 N. H. 168; Thomas *v.* Kennedy, 24 Iowa, 397. Titles to a vast amount of real property in many of the States rest upon sales of executors and administrators under the order of a court: see Watkins *v.* Holman, 16 Peters, 62.

CHAPTER XXIII.

DESCENT.

§ 262. Definition of title by.
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§ 262. Definition of title by.—Title by descent or hereditary succession is a title acquired by act or operation of law, as contradistinguished from title by purchase, or by the act or agreement of the parties.[1] It is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as his heir at law;[2] and such estate is called an inheritance.[3] The law itself casts the estate upon the heir immediately on the death of the ancestor, and he cannot disclaim it, even if he would.[4] If the estate is not devised to some other person, although the intention be ever so manifest to disinherit the heir, the law still casts the estate upon him.[5] In cases of doubt, the heir is to be preferred.[6] Title by descent is not derived from natural law, and all statutes regulating the subject may be considered as positive, and in some degree arbitrary, rules.[7]

1 See § 246, *ante;* Donahue's Estate, 36 Cal. 329.

2 2 Blackst. Com. 201; 4 Kent Com. 374. The heir is not to be disinherited by anything less than a clearly apparent intention to pass the estate in another line of succession: Cowles *v.* Cowles, 53 Pa. St. 175.

3 2 Blackst. Com. 201; 2 Greenl. Cruise, 135; and see McMakin *v.* Michaels, 23 Ind. 462; Mace *v.* Cushman, 45 Me. 250.

4 2 Blackst. Com. 201; Smith *v.* Smith, 23 Ind. 202; Burney *v.* Wilson, 11 Ohio St. 426; Overturf *v.* Dugan, 29 Ohio St. 230; and see Baxter *v.* Bradbury, 27 Me. 260.

5 Gage *v.* Gage, 29 N. H. 533; McIntire *v.* Cross, 3 Ind. 444; Haxtun *v.* Corse, 2 Barb. Ch. 506; Wright *v.* Hicks, 12 Ga. 155.

6 Walker *v.* Walker, 28 Pa. St. 40; and see Buckley *v.* Buckley, 11 Barb. 43; Gilpin *v.* Hollingsworth, 3 Md. 190.

7 Haven *v.* Foster, 9 Pick. 127. See Davis *v.* Stinson, 53 Me. 493; Cannon *v.* Nowell, 6 Jones L. 436.

§ 263. What descends to heir.—Not only every freehold interest in land, but also heir-looms,[1] and all such chattels as are annexed to or connected with the freehold, descend to the heir.[2] As between heir and executor, the rule of succession obtains with the most rigor in favor of the inheritance.[3] Standing trees and growing grass descend to the heir.[4] An interest in a contract for the purchase of land is real estate, and descends to the heirs of the purchaser.[5] But where a contract for the sale of land is void, or cannot be enforced by reason of *laches* in the purchaser, on the death of the vendor the land descends to his heirs.[6] Where, under a grant made by Congress, a person was entitled to certain land, but died before a patent was issued, it was held that the property descended to his heirs.[7] So lands purchased by the intestate at a tax sale descend to his heir, though a deed had not been made to the ancestor.[8] So a survey of lands, preliminary to a purchase from the State, but not perfected by grant, is a descendible interest.[9] Rent accruing out of land, upon a lease granted by the owner in fee, and which does not become due till after the death of the lessor, is a chattel real, which descends to the heir as part of the inheritance.[10] When the relation of trustee and *cestui que trust* exists, on the death of the trustee nothing but the mere legal estate descends to his heirs.[11] If the trustee, in violation

of his trust, buys land with the money of the *cestui que trust*, and takes the conveyance to himself, the estate descends to the heirs at law of the *cestui que trust*.[12]

1 See § 3, *ante*.

2 See § 9, *ante*; Walker *v.* Sherman, 20 Wend. 646.

3 House *v.* House, 10 Paige, 158; Buckley *v.* Buckley, 11 Barb. 43; O'Dougherty *v.* Felt, 65 Barb. 225.

4 Bank of Lansingburgh *v.* Crary, 1 Barb. 542; Warren *v.* Leland, 2 Barb. 613; § 5, *ante*. And see Foster *v.* Gorton, 5 Pick. 185.

5 Griffith *v.* Beecher, 10 Barb. 432; Moore *v.* Burrows, 34 Barb. 173; Knolls *v.* Barnhart, 9 Hun, 443; Pelton *v.* Fire Ins. Co. 77 N. Y. 607.

6 McKay *v.* Carrington, 1 McLean, 53; and see Flanders *v.* Davis, 19 N. H. 139; Stump *v.* Gaby, 117 Eng. L. & Eq. 357.

7 Forsythe *v.* Ballance, 6 McLean, 562; and see Gilpin *v.* Hollingsworth, 3 Md. Ch. 190; Frizzle *v.* Veach, 1 Dana, 211.

8 Rice *v.* White, 8 Ham. (Ohio) 216; and see Kline *v.* Bowman, 19 Pa. St. 24; Dalrymple *v.* Taneyhill, 4 Md. Ch. 171.

9 Hansford *v.* Minor, 4 Bibb, 335. A contingent interest is descendible: Clapp *v.* Stoughton, 10 Pick. 463. An equity of redemption is real estate, and descends to the heir of the mortgagor: Asay *v.* Hoover, 5 Pa. St. 21; and see Roosevelt *v.* Fulton, 7 Cowen, 71.

10 Green *v.* Massie, 13 Ill. 363.

11 Walton *v.* Coulson, 1 McLean, 132; Martin *v.* Price, 2 Rich. Eq. 412.

12 Reid *v.* Finch, 11 Barb. 399; and see Asay *v.* Hoover, 5 Pa. St. 21; Lindsay *v.* Pleasants, 4 Ired. Eq. 320. Where there has been a conversion of land into money for a specific purpose, upon its attainment the proceeds descend as money, and not as land: Large's Appeal, 54 Pa. St. 383.

§ 264. Who may be heirs.—By the common law of England, persons who are capable of claiming an estate by way of inheritance must be, first, legitimate, that is, begotten or born in lawful wedlock;[1] second, they must be either natural-born citizens, or have been duly naturalized;[2] third, they must not have been attainted of treason or felony, or claim through any ancestor who was so attainted.[3] These several heads and their statutory modifications will be more fully considered in subsequent sections.[4]

1 Co. Litt. 7 *b*; Doe *v.* Vardill, 5 Barn. & C. 438; 6 Bing. N. C. 385; Bollerman *v.* Blake, 11 N. Y. Week. Dig. 555; Doe *v.* Bates, 6 Blackf. 533; Cooley *v.* Dewey, 4 Pick. 93; Stover *v.* Boswell, 3 Dana, 233; Kirkpatrick *v.* Rogers, 6 Ired. Eq. 130; Miller *v.* Miller, 18 Hun, 507.

2 Doe *v.* Jones, 4 Term Rep. 300; Jackson *v.* Beach, 1 Johns. Cas. 399; and see Holliman *v.* Peebles, 1 Tex. 673; Munroe *v.* Merchant, 29 N. Y. 9.

3 See 2 Greenl. Cruise, 145; § 255, *ante*.
4 §§ 267, 269, 270, *post*.

§ 265. Consanguinity, or kindred.—The common-law doctrine of inheritance depends on the nature of kindred, and the several degrees of consanguinity.[1] And consanguinity, or kindred, is defined to be the connection or relation of persons descended from the same stock or common ancestor,[2] who is the *stirps* or root from whom the line of descent is traced.[3] Consanguinity is either lineal or collateral.[4] The former subsists between persons of whom one is descended in a direct line from the other, such as father and son;[5] the latter subsists between persons lineally descended from the same common ancestor or *stirps*, but not one from the other.[6] Thus, an uncle and nephew are collaterally related, since each may trace his line of descent to the same common ancestor.[7] The mode of computing the degrees of consanguinity by the canon and common law is to begin at the common ancestor and reckon downwards, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related.[8] Thus, two brothers are related in the first degree, because from the father to either of them is but a single step; but an uncle and nephew are related in the second degree, because the latter is two degrees removed from the common ancestor.[9] By the rule of the civil law, which has been generally adopted in the United States, the degrees of consanguinity are computed "by adding together the number of degrees there are between each of the two persons whose relationship is to be ascertained and the common ancestor";[10] and according to this rule, brothers are related in the second, uncle and nephew in the third, and cousins in the fourth degree of kindred.[11]

1 2 Blackst. Com. 202.
2 2 Blackst. Com. 202; 2 Greenl. Cruise, 137.
3 2 Blackst. Com. 204; 2 Wash. Real Prop. 405.
4 2 Blackst. Com. 202.

5 2 Blackst. Com. 203.

6 2 Blackst. Com. 204; 2 Wash. Real Prop. 405, 406.

7 2 Wash. Real Prop. 406.

8 Co. Litt. 23; 2 Blackst. Com. 206; 2 Greenl. Cruise, 137, 138; 4 Kent Com. 413.

9 2 Blackst. Com. 206, 207.

10 2 Wash. Real Prop. 406. The civil-law rule of computation of degrees of kindred is the law in all the States of the Union except North Carolina: Clayton *v.* Drake, 17 Ohio St. 367.

11 2 Wash. Real Prop. 406; 4 Kent Com. 412, 413.

§ 266. What law controls.— When lands are claimed by descent, the capacity to take must have existed in the heir at the moment of the death of the ancestor;[1] and such capacity, as well as the right of the State, in the event of there being no person to inherit, must depend upon the law in force at the time of the ancestor's death.[2] And although the capacity to take may be enlarged by subsequent laws, yet such laws cannot operate retrospectively to divest an estate in lands which then vested in the State.[3] And lands are to descend according to the laws of the State in which they are situated, irrespective of the domicile of the person dying intestate, or of those claiming as heirs.[4]

1 Donovan *v.* Pitcher, 53 Ala. 411; 25 Am. Rep. 634; and see People *v.* Conklin, 2 Hill, 67; Dawson *v.* Godfrey, 4 Cranch, 322; Anson *v.* Stein, 6 Clarke, 150.

2 White *v.* White, 2 Met. (Ky.) 185; Lee *v.* Smith, 18 Tex. 141; McGaughey *v.* Henry, 15 Mon. B. 383; Miller *v.* Miller, 10 Met. 401; Marshall *v.* King, 24 Miss. 85.

3 Donovan *v.* Pitcher, 53 Ala. 411; 25 Am. Rep. 634.

4 Potter *v.* Titcomb, 29 Me. 300; and see Smith *v.* Kelly, 23 Miss. 167; Smith *v.* Derr, 34 Pa. St. 126; Bollerman *v.* Blake, 24 Hun, 187; 11 N. Y. Week. Dig. 555.

§ 267. Illegitimate children.— Illegitimate children, or bastards, are not capable of being heirs by the common law.[1] And as bastards cannot be heirs themselves, neither can they have any heirs except those of their own bodies.[2] But the illegitimacy of a married woman's child can in general be inferred only from the impossibility of the husband's access.[3] The rule of the common law which excludes children and relatives who

are illegitimate from the inheritance has been modified by statute in nearly all the States, and especially to the extent of providing that, as between mothers and their illegitimate children, the latter can inherit from and transmit to the former real and personal estates.[4] In some of the States bastards may be rendered legitimate by the subsequent intermarriage of their parents;[5] in others, by a deed or writing executed by the father, distinctly acknowledging the paternity of the child, and attested by a competent witness.[6] Children born before marriage, though by the laws of the country in which they are born the subsequent marriage of their parents may render them legitimate, are not capable of inheriting land in England.[7] And it is held in Pennsylvania, that a child born out of wedlock, and made legitimate by the laws of another State, is not thereby rendered capable of inheriting land in the former State.[8] So, in New York, the common-law rule, that in respect to descent the personal *status* of legitimacy acquired under foreign law does not confer the right of inheritance of real property, still obtains.[9]

1 § 264, *ante;* Pratt *v.* Atwood, 108 Mass. 40; Barwick *v.* Miller, 4 Desaus. Eq. 434; Sneed *v.* Ewing, 5 Marsh. J. J. 460; 22 Am. Dec. 41; Cooley *v.* Dewey, 4 Pick. 93; 16 Am. Dec. 326; Blacklaws *v.* Milne, 82 Ill. 505.

2 In re Wilcox Settlement, Law R. 1 Ch. Div. 229; McGunnigle *v.* McKee, 77 Pa. St. 81; 18 Am. Rep. 428. The maxim of the common law, that a bastard is *nullius filius*, is entirely rejected in Connecticut, and such a child is there recognized by law as the child of its mother, with all the rights and duties of a child: New Haven *v.* Newtown, 12 Conn. 165; Bethlehem *v.* Roxbury, 20 Conn. 340; New Haven *v.* Huntington, 22 Conn. 25; Dickinson's Appeal, 42 Conn. 491; 19 Am. Rep. 553.

3 Head *v.* Head, 1 Turn. 138; 1 Sim. & St. 150; Goodright *v.* Saul, 4 Term Rep. 356; Stegall *v.* Stegall, 2 Brock. 256; Commonw. *v.* Shepherd, 6 Binn. 283; 6 Am. Dec. 449; Cannon *v.* Cannon, 7 Humph. 410; Cross *v.* Cross, 3 Paige, 139; 23 Am. Dec. 778.

4 See 4 Kent Com. 413, *et seq.;* Brewer *v.* Blougher, 14 Peters, 178; McGuire *v.* Brown, 41 Iowa, 650; Haraden *v.* Larrabee, 113 Mass. 430; Dickinson's Appeal, 42 Conn. 491; 19 Am. Rep. 555. Legislative power to legitimate a bastard child has long been recognized, both in England and in this country: McGunnigle *v.* McKee, 77 Pa. St. 81; 18 Am. Rep. 430; Miller's Appeal, 52 Pa. St. 113; Brewer *v.* Blougher, 14 Peters, 178; Dyer *v.* Brannock, 66 Mo. 391; Beall *v.* Beall, 8 Ga. 210; Moore *v.* Moore, 35 Vt. 98; Shelton *v.* Wright, 25 Ga. 636. In Kentucky, a bastard cannot inherit from his mother's ancestors: Jackson *v.* Jackson, 78 Ky. 390; 39 Am. Rep. 246.

5 See Hunter v. Whitworth, 9 Ala. 965; Dickinson's Appeal, 42 Conn. 491; 19 Am. Rep. 556.

6 See Hunt v. Hunt, 37 Me. 333. Connecticut has passed no statute defining the rights of bastards, and in that State a bastard has inheritable blood for the purpose of collateral as well as lineal descent through him: Dickinson's Appeal, 42 Conn. 491; 19 Am. Rep. 556. Thus, the estate of A is held to be inheritable by B, as heir at law, through C, his grandmother, a sister of A, and D his mother, the illegitimate daughter of C: Dickinson's Appeal, 42 Conn. 491; 19 Am. Rep. 556; and see Canaan v. Salisbury, 1 Root, 155; New Haven v. Huntington, 22 Conn. 25. In a few of the States it is held that, independently of statute, one illegitimate child may inherit to another of the same mother; Burlington v. Fosby, 6 Vt. 83; 27 Am. Dec. 535; Brown v. Dye, 2 Root, 280; Heath v. White, 5 Conn. 228; Flintham v. Holder, 1 Dev. & B. 346. Compare Bacon v. McBride, 32 Vt. 585; Lewis v. Eutler, 4 Ohio St. 354.

7 Doe v. Vardill, 5 Barn. & C. 438.

8 Smith v. Derr, 34 Pa. St. 126.

9 Bollerman v. Blake, 11 N. Y. Week. Dig. (1881), 555; and see Donovan v. Pitcher, 53 Ala. 411; 25 Am. Rep. 634.

§ 268. Posthumous children. — Posthumous children inherit in all cases, and in the same manner, as if they had been born in the life-time of the father, and had survived him.[1] For the purposes of heirship a child *in ventre sa mere* is considered as absolutely born.[2]

1 Den v. Flora, 8 Ired. 374; 4 Kent Com. 412; Doe v. Clark, 2 Black. H. 399; and see Botsford v. O'Connor, 57 Ill. 72.

2 Hall v. Hancock, 15 Pick. 255; 26 Am. Dec. 598; Harper v. Archer, 4 Smedes & M. 99; Marsellis v. Thalhelmer, 2 Paige, 35; 21 Am. Dec. 66; Long v. Blackall, 7 Term Rep. 100; Thellusson v. Woodford, 4 Ves. 322; and see Foster v. Cook, 3 Bro. C. C. 347. Where a child is delivered by the Cæsarean operation after its mother's death, the father is not entitled to take by courtesy: Marsellis v. Thalhimer, 2 Paige, 35; 21 Am. Dec. 66; Matter of Winne, 1 Lans. 513.

§ 269. Rights of aliens.—An alien cannot take by descent at common law, and having no inheritable blood, he cannot transmit an estate by inheritance.[1] But an alien may be naturalized by act of parliament in England, and thereby become as capable of inheriting real property as if he were a natural-born subject.[2] And a person duly naturalized according to the provisions of act of Congress (U. S. Rev. Stats. § 2172) has the like capacity to take and transmit real property as a native-born citizen.[3] In most of the States, an alien is authorized by statute to hold real estate, and it will descend to whoever is his lawful heir.[4]

1 Collingwood *v.* Pace, 1 Vent. 413; Jackson *v.* Fitzsimmons, 10 Wend. 9; 24 Am. Dec. 198; McCarthy *v.* Marsh, 5 N. Y. 274; Vermont *v.* Boston etc. R. R. Co. 25 Vt. 433; Fairfax *v.* Hunter, 7 Cranch, 603; Governeur *v.* Robertson, 11 Wheat. 332; Levy *v.* McCartee, 6 Peters, 102; Cross *v.* DeValle, 1 Cliff. 282; Crane *v.* Reeder, 21 Mich. 24; 4 Am. Rep. 430.

2 2 Greenl. Cruise, 143. The English statute of 11 & 12 Will. 3, c. 6, removed the common law disability of claiming through an alien ancestor: see McCreery *v.* Somerville, 9 Wheat. 354; People *v.* Irvin, 21 Wend. 128; McKinney *v.* Saviego, 18 How. 235.

3 See Jackson *v.* Green, 7 Wend. 333; Ritchie *v.* Putnam, 13 Wend. 524; State *v.* Penney, 5 Eng. (Ark.) 621.

4 See § 19, *ante;* Luhrs *v.* Eimer, 80 N. Y. 171; Hall *v.* Hall, 81 N. Y. 130; Farrell *v.* Enright, 12 Cal. 450; Jones *v.* McMasters, 20 How. 8; Rubeck *v.* Gardner, 7 Watts, 455; Starks *v.* Traynor, 11 Humph. 292.

§ 270. Attainder.—By the English law, persons attainted of high treason or felony are incapable of taking lands by descent or of transmitting them to their heirs.[1] A person may, however, inherit from one of his parents, though the other was attainted of treason or felony.[2] Attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinherison of his heirs, or of those who would otherwise be his heirs.[3] This was felt to be a great hardship and injustice to innocent children, and when the Federal Constitution was framed, it was ordained that no attainder of treason should work corruption of blood or forfeiture except during the life of the person attainted.[4] And under the act of Congress of July 17th, 1862 (12 Statute at Large, 589), known as the Confiscation Act, and the joint resolution of the same date explanatory of it, only the life estate of the person for whose offense the land has been seized is subject to condemnation and sale.[5] But when the provisions of the act have been carried into effect by appropriate proceedings in any given case, the offender has no longer any interest or ownership in the thing forfeited which he can convey, or any power over it which he can exercise in favor of another.[6] After his death, the land shall pass and be owned as if it had not been forfeited.[7]

1 2 Greenl. Cruise, 145; Co. Litt. 391; 2 Blackst. Com. 251; Burt. Real Prop. § 329.

2 2 Greenl. Cruise, 245.

3 2 Blackst. Com. 253, 254; and see Wallach v. Van Riswick, 92 U. S. 202.

4 U. S. Const. art. 3, § 3.

5 Day v. Micon, 18 Wall. 156.

6 Wallach v. Van Riswick, 92 U. S. 202; and see Semmes v. United States, 91 U. S. 21.

7 Wallach v. Van Riswick, 92 U. S. 202. Compare Moore v. Littel, 41 N. Y. 78; Higginson v. Mein, 4 Cranch, 415; McGregor v. Comstock, 17 N. Y. 164; Gilbert v. Bell, 15 Mass. 44.

§ 271. Seizin of ancestor.—It is a maxim of the common law that *non jus sed seisina facit stipitem*.[1] Actual seizin, or seizin in deed,[2] was necessary to make any person the *stirps* or stock from which all future inheritance, by right of blood, must be derived.[3] If he had a seizin in law only, it was not deemed sufficient.[4] Even where a rent descended to a person, it was necessary actually to receive the rent before he could become the stock of a descent.[5] It followed from this doctrine, that if the heir on whom the inheritance had been cast died before acquiring the requisite seizin, his ancestor, and not himself, was the person last seized, and the one to whom the claimants must make themselves heirs.[6] An exception to the rule was where an ancestor acquired an estate by purchase, he was in some cases allowed to transmit it to his heirs, though he never had actual seizin of it himself.[7] So in case of an exchange of lands, if one of the parties had entered, and the other died before entry, his heir would take by descent.[8] And equitable interests in lands may be transmitted to the heir, by an ancestor who never had obtained any kind of seizin or possession.[9] In this country, generally speaking, the maxim *seisina facit stipitem* has either never been adopted,[10] or has expressly, or by implication, been abrogated;[11] and on the death of the ancestor, the descent is cast upon the heir without any reference to the seizin of such ancestor.[12] The heir takes by descent all the real estate owned by the ancestor at the time of his death;[13] no distinction being made in this respect between estates in possession and in reversion.[14]

1 2 Blackst. Com. 209; 2 Greenl. Cruise, 149; 4 Kent Com. 386.

2 See § 20, *ante*; Vanderheyden *v.* Crandall, 2 Denio, 9.

3 2 Blackst. Com. 209; 2 Greenl. Cruise, 149; Chirac *v.* Reinecker, 2 Peters, 625; and see Jackson *v.* Hendricks, 3 Johns. Cas. 214; Doe *v.* Keen, 7 Term Rep. 386.

4 2 Greenl. Cruise, 149. But this rule was changed by Statute 3 & 4 Will. 4, c. 106.

5 2 Greenl. Cruise, 149; Co. Litt. 11 *b*.

6 Burt. Real Prop. § 303; 4 Kent Com. 386; Goodtitle *v.* Newman, 3 Wils. 516; 1 Sim. & St. 260.

7 Shelley's Case, 1 Coke, 98 *a*; Burt. Real Prop. § 304; 2 Greenl. Cruise, 149.

8 Shelley's Case, 1 Coke, 98 *a*; 4 Kent Com. 386.

9 Potter *v.* Potter, 1 Ves. Sr. 437; and see Roup *v.* Bradner, 19 Hun, 513.

10 See Hillhouse *v.* Chester, 3 Day, 166; 3 Am. Dec. 265.

11 See Bush *v.* Bradley, 4 Day, 306; Thompson *v.* Sandford, 13 Ga. 238; Kean *v.* Hoffecker, 2 Har. (Del.) 103; 29 Am. Dec. 336; Moor *v.* Rake, 2 Dutch. 574; Russell *v.* Hoar, 3 Met. 187; Guion *v.* Burton, Meigs, 565; Chirac *v.* Reinecker, 2 Peters, 625; 4 Kent Com. 388.

12 Hillhouse *v.* Chester, 3 Day, 166; 3 Am. Dec. 265.

13 Hillhouse *v.* Chester, 3 Day, 166; 3 Am. Dec. 265; Hartley *v.* State, 3 Ga. 238; Cook *v.* Hammond, 4 Mason, 484.

14 Cook *v.* Hammond, 4 Mason, 484; 4 Kent Com. 389. One who has a vested remainder in fee-simple, expectant on the determination of a present freehold estate, has such a seizin in law, where the estate was acquired by purchase, as will constitute him a *stirps*, or stock of descent: Wendell *v.* Crandall, 1 N. Y. 491; Vanderheyden *v.* Crandall, 2 Denio, 9.

§ 272. English rules of descent.—The rules or canons of inheritance by which estates are transmitted from the ancestor to the heir, according to the English law, are thus laid down by Sir William Blackstone:[1] *First*, inheritances shall lineally descend to the issue of the person who last died actually seized, *in infinitum*, but shall never lineally ascend.[2] *Second*, the male issue shall be admitted as heirs before females.[3] *Third*, where there are two or more males, in equal degree, the eldest only shall inherit, but the females altogether.[4] *Fourth*, the lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor, that is, stand in the same place as the person himself would have done had he been living.[5] *Fifth*, on failure of lineal descendants, or issue of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first pur-

chaser, subject to the last three preceding rules.[6] *Sixth*, the collateral heir of the person last seized must be his next collateral kinsman of the whole blood.[7] *Seventh*, in collateral inheritances the male stocks shall be preferred to the female, unless where the lands have, in fact, descended from a female.[8]

1 2 Blackst. Com. 208, *et seq.*; and see 2 Greenl. Cruise, 146; Wms. Real Prop. 76.

2 2 Blackst. Com. 208. The law now is, that the descent shall be traced from the last person entitled to the estate as a purchaser: Stat. 3 & 4 Will. 5, c. 106; and see Wms. Real Prop. 78. Before the death of the ancestor, the person who is next in the line of succession is called an heir apparent, or an heir presumptive: 2 Blackst. Com. 208; Anon. Lofft, 273.

3 2 Blackst. Com. 213. See Stat. 3 & 4 Will. 4, c. 106, § 7.

4 2 Blackst. Com. 214. Daughters take the inheritance as coparceners, and are said to make but one heir: Burt. Real Prop. § 316.

5 2 Blackst. Com. 216; Burt. Real Prop. 315. This taking by representation is called succession *per stirpes*, or according to the roots, in distinction from a taking *per capita*, that is, where each takes next in degree to the ancestor in his own direct right: 2 Blackst. Com. 217, 218; 2 Wash. Real Prop. 407; 4 Kent Com. 391, 392; Davis *v.* Stinson, 53 Me. 493. See Kelly *v.* Kelly, 5 Lans. 443.

6 2 Blackst. Com. 220. This rule is altered by statute, and preference is given to lineal ancestors over collateral kindred: Stat. 3 & 4 Will. 4, c. 106, § 6.

7 2 Blackst. Com. 224. See Hawkins *v.* Shewen, 1 Sim. & St. 257. Relations of the half-blood are now capable of inheriting: Stat. 3 & 4 Will. 4, c. 106, § 9. See 2 Greenl. Cruise, 164, note; Wms. Real Prop. 86.

8 2 Blackst. Com. 234. Under this rule, the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all: 2 Blackst. Com. 234; Clere *v.* Brooke, Plow. 442.

§ 273. Principles of descent in United States.— The English rules or canons of inheritance are of feudal origin and growth, and in their most essential features have been universally rejected in the United States.[1] Each State has adopted its own rules regulating the descent of real property, and while they differ materially as to details in the several States, they will in the main be found to be the converse of those which have obtained in England.[2] Thus the principles of primogeniture among males, the preference of males to females, the exclusion of the lineal ascent of the inheritance, and the entire exclusion of the half-blood, have generally been rejected as inconsistent with and unsuited to the character and

policy of the different State governments.[3] Nor is it required in ascertaining who is heir that search be made for the first purchaser, and that his blood be traced to the claimant.[4] Generally, property descends to the next of kin to the deceased owner;[5] lineal descendants share equally *per capita*, if they stand in equal degree to the common ancestor;[6] if in different degrees, they inherit *per stirpes*;[7] where lineal descendants fail, lineal ancestors are preferred to collateral branches;[8] but the ascending line, after parents, is postponed to the collateral line of brothers and sisters;[9] in some of the States, no essential distinction is made between claims of the whole and of the half blood;[10] in other States a preference is given to the whole blood,[11] but in none of them is the half blood wholly excluded.[12] The above are given as a few of the general features common to the laws of descent in the several States, leaving the statutes of the particular State to be consulted as it respects details and points of variance.[13]

1 See 4 Kent Com. 385, 412; Bogert *v.* Furman, 10 Paige, 496; Sweezey *v.* Willis, 1 Bradf. 495.

2 See Haven *v.* Foster, 9 Pick. 127; Watkins *v.* Holman, 16 Peters, 63; Kean *v.* Hoffecker, 2 Har. (Del.) 103; 29 Am. Dec. 336; Parker *v.* Nims, 2 N. H. 460; Bollerman *v.* Blake, 24 Hun, 87.

3 Kean *v.* Hoffecker, 2 Har. (Del.) 103; 29 Am. Dec. 336; Watson *v.* Hill, 1 McCord, 161; 4 Kent Com. 411, 412. Compare Lewis *v.* Claiborne, 5 Yerg. 369; Armington *v.* Armington, 28 Ind. 74.

4 Cook *v.* Hammond, 4 Mason, 484; § 271, *ante*. Compare Posey *v.* Budd, 21 Md. 489; Chirac *v.* Reinecker, 2 Peters, 625.

5 See Kean *v.* Hoffecker, 2 Har. (Del.) 103; 29 Am. Dec. 336; Curtis *v.* Hewins, 11 Met. 294; Cozzens *v.* Joslin, 1 R. I. 122; Hart's Appeal, 8 Pa. St. 32; Betts *v.* Wirt, 3 Md. Ch. 113; Brown *v.* Burlingham, 5 Sand. 418; Peacock *v.* Smart, 17 Mo. 402; Greenlee *v.* Davis, 19 Ind. 60; Beebee *v.* Griffing, 14 N. Y. 235. In no sense are husband and wife next of kin to one another: Townsend *v.* Radcliffe, 44 Ill. 446.

6 4 Kent Com. 390, 391; Dutoit *v.* Doyle, 16 Ohio St. 400; Hyatt *v.* Pugsley, 33 Barb. 373; McCracken *v.* Rogers, 6 Wis. 278.

7 4 Kent Com. 391; and see Brenneman's Appeal, 40 Pa. St. 115; La. Civ. Code, art. 882.

8 See Kelsey *v.* Hardy, 20 N. H. 479. The rule is otherwise under the New York Revised Statutes: 1 R. S. 752, § 10. But it is laid down as a general rule in the American law of descent, that grandparents take the estate before uncles and aunts, as being nearer of kin to the intestate, according to the computation of the civil law: 4 Kent Com. 407; see § 265, *ante*.

9 4 Kent Com. 407; see Quinby v. Higgins, 14 Me. 309. According to the New York statute of descents, the father inherits the whole estate of his intestate son, unmarried, and dying without issue, unless the inheritance came to the intestate on the part of his mother, in which case the father takes only a life estate: Morris v. Ward, 36 N. Y. 587. See Torrey v. Shaw, 3 Edw. Ch. 356. Descent between brother and sister is immediate, notwithstanding the alienage of the parent: Bradley v. Dwight, 62 How. Pr. 302.

10 Sheffeld v. Lovering, 12 Mass. 490; Beebee v. Griffing, 14 N. Y. 235; Alston v. Alston, 7 Ired. 172; Moore v. Abernathy, 7 Blackf. 442; Hatch v. Hatch, 21 Vt. 450; Tyson v. Postlethwaite, 13 Ill. 732; Nichol v. Dupree, 7 Yerg. 415; Baker v. Heiskell, 1 Cold. 641; Gardner v. Collins, 3 Mason, 398; 2 Peters, 58.

11 Kean v. Hoffecker, 2 Har. (Del.) 103; 29 Am. Dec. 336; Whitcomb v. Reid, 31 Miss. 567; Scott v. Terry, 37 Miss. 65; Petty v. Malier, 15 Mon. B. 591; Lee v. Smith, 18 Tex. 141; and see Walker v. Dunshee, 38 Pa. St. 430; Stewart v. Jones, 8 Gill & J. 1.

12 4 Kent Com. 404; and see Kean v. Hoffecker, 2 Har. (Del.) 103; 29 Am. Dec. 336.

13 See abstract of statute rules of descent: 2 Greenl. Cruise, 171; 2 Wash. Real Prop. 417.

§ 274. Advancement.—An advancement is said to be a pure and irrevocable gift by a parent in his life-time to his child, on account of such child's share of the estate after the parent's decease.[1] And it is a principle universally recognized in the several States, that if a child has received such gift or advancement from the parent, in his life-time, the same must be deducted from such child's share in the distribution of the estate.[2] One essential element of an advancement is that it must once have been a part of the ancestor's estate, which, upon his death, would descend to his heirs but for the fact that it has, by the act of the ancestor in making the gift, been separated from or taken out of his estate, or it must be something which is purchased with the funds of the father in the name and for the benefit of the child.[3] The proof must be clear that the advancement was intended, not as a mere gift, but as a part of the inheritance.[4] The intention of the donor, as indicated by all the circumstances attending the gift, decides its effect.[5] An advancement may be made either in personal property or in real estate;[6] and parol evidence is admissible to show an advancement.[7] Advancements are generally estimated at their value when they were given, or when the

grantees came into possession of them;[8] or, as some of the decisions hold, according to their value at the time of the testator's death.[9] As a general rule, advancements do not bear interest,[10] nor is increase to be charged to the party to whom the advancement was made.[11] Lapse of time or limitation does not affect an advancement.[12]

1 Miller's Appeal, 31 Pa. St. 338; and compare Eshleman's Appeal, 74 Pa. St. 42; Cawthon v. Coppedge, 1 Swan, 487; Dilman v. Cox, 23 Ind. 442; Crosby v. Covington, 24 Miss. 619; Sanford v. Sanford, 5 Lans. 486; 61 Barb. 293; O'Brien v. Shiel, 7 I. R. Eq. 255. By statute, in some of the States advancements are made to apply equally to grandchildren: Porter v. Porter, 51 Me. 376; Barber v. Taylor, 9 Dana, 85.

2 See Crosby v. Covington, 24 Miss. 619; Clark v. Wilson, 27 Md. 693; Hartwell v. Rice, 1 Gray, 587; Smith v. Smith, 21 Ala. 761; Lee v. Boak, 11 Gratt. 182.

3 Ison v. Ison, 5 Rich. Eq. 19; Weaver's Appeal, 63 Pa. St. 309; Sweet v. Northrup, 12 N. Y. Week. Dig. 377; Brown v. Burke, 22 Ga. 574; Page v. Page, 8 N. H. 187; Jackson v. Moore, 6 Cowen, 706; Riker v. Kidder, 2 Mad. 101; 10 Ves. 366. Where a father purchased and paid for a policy of insurance on his own life in the name of his daughter, and for her sole benefit, and paid the annual premiums until his death, it was held that the amount of the policy and of the annual premiums after its purchase were advancements: Rickenbacker v. Zimmerman, 10 S. C. 110; 30 Am. Rep. 37.

4 See Shewood v. Smith, 23 Conn. 516; Lawson's Appeal, 23 Pa. St. 85; Middleton v. Middleton, 31 Iowa, 151. Trifling gifts ought not to be charged as advancements: Sanford v. Sanford, 5 Lans. 486; 61 Barb. 293. And money expended in the maintenance and education of a child is not in general to be deemed an advancement: Mitchell v. Mitchell, 8 Ala. 414; Riddle's Estate, 19 Pa. St. 431; McRae v. McRae, 3 Bradf. 199.

5 Murrell v. Murrell, 2 Strob. Eq. 148; Weaver's Appeal, 63 Pa. St. 309; Meeker v. Meeker, 16 Conn. 383. But compare Rees v. Rees, 11 Rich. Eq. 86.

6 Brown v. Burke, 22 Ga. 574; Shiver v. Brock, 2 Jones Eq. 137; Autrey v. Autrey, 37 Ala. 614. Compare Havens v. Thompson, 23 N. J. Eq. 321.

7 Parks v. Parks, 19 Md. 323; and see Bay v. Cooke, 31 Ill. 336; Parker v. McCluer, 5 Abb. Pr. N. S. 97; 3 Abb. Ct. App. 454; 36 How. Pr. 301; Cecil v. Cecil, 20 Md. 153.

8 Wilks v. Green, 14 Ala. 443; Clark v. Wilson, 27 Md. 693; Hook v. Hook, 13 Mon. B. 526; Jackson v. Jackson, 28 Miss. 674.

9 Miller's Appeal, 31 Pa. St. 337; and see McCaw v. Blewit, 2 McCord, 91.

10 Miller's Appeal, 31 Pa. St. 337; Krebs v. Krebs, 35 Ala. 293; Nelson v. Wyan, 21 Mo. 347.

11 Miller's Appeal, 31 Pa. St. 337; Osgood v. Breed, 17 Mass. 355; Towles v. Rountree, 19 Fla. 299.

12 Hughes' Appeal, 57 Pa. St. 179.

§ 275. Lands charged with debt of ancestor.— By the rule of the common law, land descended to the heir was not liable to the simple contract debts of the

ancestor,[1] nor was the heir bound even by a specialty, unless he was expressly named.[2] But this rule has been altered by statute in the several States, and heirs take the land by descent subject to the payment of the debts of the ancestor, whether arising by simple contract or by specialty.[3] In fact and in law, they have no right to the real estate of their ancestors, except that of possession, until the creditors shall be paid.[4] The debts are an equitable lien upon the estate in the possession of the heir, and prior in time to judgments recovered against them for their individual debts.[5] The personal estate is, however, the primary fund for the discharge of the debts, and is to be first applied and exhausted.[6] And heirs at law are, in a variety of cases, entitled to a "marshaling of assets," as it is called, in their favor;[7] as where an heir is sued by a bond creditor, he may in many cases be entitled to stand in the place of such specialty creditor against the personal estate of the deceased ancestor.[8]

1 3 Blackst. Com. 430; Hays v. Jackson, 6 Mass. 149.

2 Co. Litt. 209 a; 4 Kent Com. 420.

3 See 4 Kent Com. 420; Watkins v. Holman, 16 Peters, 25; 2 N. Y. Rev. Stat. 452, § 22; Chase v. Lockerman, 11 Gill & J. 185; Gallagher's Appeal, 48 Pa. St. 122; McLean v. Wade, 53 Pa. St. 146; House v. Raymond, 3 Hun, 44. And so by statute in England: Stat. 3 & 4 W. & M. c. 14; and see Goodchild v. Terret, 5 Beav. 398; 2 Lead. Cas. Eq. 78.

4 Watkins v. Holman, 16 Peters, 25. Under the Mexican system, on the death of an intestate, the heirs succeeded immediately to the estate, and became personally responsible for the debts of the deceased, whether they were adults or minors: Coppinger v. Rice, 33 Cal. 408.

5 Morris v. Mowatt, 2 Paige, 586; and see Cockrell v. Coleman, 55 Ala. 583.

6 Hays v. Jackson, 6 Mass. 149; Bishop v. O'Conner, 69 Ill. 431; McLean v. McBean, 74 Ill. 134; Ward v. Ward, 15 Pick. 511; Livingston v. Livingston, 3 Johns. Ch. 148; Harvey v. Steptoe, 17 Gratt. 289; Salisbury v. Morss, 7 Lans. 359; Howel v. Price, 1 P. Wms. 291. But a judgment creditor need not show that proceedings had been taken against the administrator for the collection of his debt, and a failure, if he shows that the personal assets of the deceased were insufficient for the payment of his debts: Blossom v. Hatfield, 24 Hun, 210; and see Stuart v. Kissam, 11 Barb. 271.

7 See Hays v. Jackson, 6 Mass. 149; Livingston v. Newkirk, 3 Johns. Ch. 312; Schermerhorn v. Bashydt, 9 Paige, 49; Robards v. Wortham, 2 Dev. Eq. 173.

8 Galton v. Hancock, 2 Atk. 424: and see 2 Lead. Cas. Eq. 215.

CHAPTER XXIV.

DEED.

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§ 276. Definition and nature of.—The most usual mode of acquiring an estate by purchase, at the present day, is that by deed or private grant.[1] An unlimited power of alienation existed in England, in the time of the Saxons, but after the Norman Conquest, and the establishment of the feudal law, all lands became unalienable.[2] The power of alienation was, however, gradually extended by the enactment of various statutes, and finally, by Statute 12 Cha. 2, c. 24, military tenures were abolished, and all freehold estates became thereby alienable without license or fine.[3] But the transfer of title to lands was not usually by writing, prior to the statute of frauds and perjuries of 29 Cha. 2, c. 3.[4] By the provisions of this act, an instrument in writing was required, as a means of conveying lands or any interest therein, and such an instrument is called a deed.[5] The same provisions have either been adopted, or assumed to be law, in the several States of the Union, and a writing having all the necessary requisites of a deed is required, if the interest to be thereby transferred is a freehold one.[6] In this connection, a deed may therefore be defined as an instrument in writing, under seal, by which lands, tenements, or hereditaments, for an estate not less than a freehold, are conveyed.[7] "Conveyance" is the common statutory word used to denote the deed, act, or instrument by which property in real estate is transferred.[8] The term "grantor" is the most comprehensive to signify one who conveys lands, and he to whom the conveyance is made is called the "grantee."[9]

1 See 2 Blackst. Com. 287; 2 Greenl. Cruise, 296.

2 2 Greenl. Cruise, 297; 4 Kent Com. 441, *et seq.*

3 2 Blackst. Com. 289; and see Van Rensselaer *v.* Hays, 19 N. Y. 68; De Peyster *v.* Michael, 6 N. Y. 467.

4 See 1 Spence Eq. Jur. 8, 20; Burt. Real Prop. § 20; Wms. Real Prop. 126.

5 Burt. Real Prop. § 20. It is called a deed, in Latin *factum*, because it is the most solemn and authentic act that a man can perform in the disposal of his property: Co. Litt. 35 *b*; 2 Blackst. Com. 297; Hammond *v.* Alexander, 1 Bibb, 333.

6 4 Kent Com. 450; and see Cunningham *v.* Freeborn, 11 Wend. 240; Stewart *v.* Clark, 13 Met. 79.

7 Stewart *v.* Clark, 13 Met. 79; Whitney *v.* Sweet, 22 N. H. 10; Jackson *v.* Wood, 12 Johns. 73; and see Wing *v.* Chase, 35 Me. 260; M'Cabe *v.* Hunter, 7 Mo. 355; Taylor *v.* Morton, 5 Dana, 365; Thompson *v.* Gregory, 4 Johns. 81; 4 Am. Dec. 255.

8 Dudley *v.* Sumner, 5 Mass. 472; Livermore *v.* Bagley, 3 Mass. 510. The word "convey" passes the title as effectually as a grant at common law: Patterson *v.* Carneal, 3 Marsh. A. K. 618; 13 Am. Dec. 208.

9 Dudley *v.* Sumner, 5 Mass. 472.

§ 277. Essentials of a good deed.—Briefly stated, the circumstances usually deemed necessary to the validity of a deed of conveyance are, *first*, writing on paper or parchment; *second*, sufficient parties; *third*, a good and sufficient consideration; *fourth*, apt words required by law; *fifth*, sealing; *sixth*, delivery.[1] And where a statute requires that a deed of land shall be attested by witnesses, such attestation is essential to a valid conveyance.[2] And it may be observed generally, in this connection, that the forms and solemnities requisite to pass the title to land must be in conformity to the laws of the State in which the land is situated.[3]

1 See Co. Litt. 35 *b*; 2 Greenl. Cruise, 308; 2 Blackst. Com. 296; Chiles *v.* Conley, 2 Dana, 21; Sicard *v.* Davis, 6 Peters, 124; Jackson *v.* Schoomaker, 2 Johns. 235; Long *v.* Ramsay, 1 Serg. & R. 72; Duncan *v.* Hodges, 4 McCord, 239.

2 Crane *v.* Reeder, 21 Mich. 24; 4 Am. Rep. 430. Compare Dole *v.* Thurlow, 12 Met. 165.

3 Doe *v.* Nelson, 2 McLean, 383; Clark *v.* Graham, 6 Wheat. 577; McCormick *v.* Sullivant, 10 Wheat. 202; Meighen *v.* Strong, 6 Minn. 177; Robinson *v.* Bland, 2 Burr. 1079. Compare Root *v.* Brotherson, 4 McLean, 230; Baygents *v.* Beard, 41 Miss. 531.

§ 278. On what material written.—A deed must be written (or printed) on paper or parchment, and if

written on any other material, such as wood, stone, linen, leather, or the like, it is not a good deed, though it be sealed and delivered.[1] The reason given for the rule is, that a writing on paper or parchment is less likely to be altered, vitiated, or corrupted.[2] As it respects grammatical structure or orthography, the law is less strict, and the writing may be in any known language, or in any hand; false Latin or English, though it be very bad, will not render a deed void.[3]

1 Co. Litt. 35 b; Warren v. Lynch, 5 Johns. 246; 1 Broom & Had. Com. (Walt's ed.) 724.

2 2 Blackst. Com. 297; 2 Greenl. Cruise, 325.

3 Shrewsbury's Case, 9 Rep. 48; Shep. Touch. 55.

§ 279. Filling blanks.—It has generally been held that all the matter of a deed must be written before delivery;[1] and that a blank paper, signed, sealed, and delivered, and then written upon, is no deed.[2] But a deed may be signed and sealed, and then filled up, if this be done before delivery.[3] And in a recent case in Iowa, in which State a seal is not necessary to the validity of a deed, it was held that where a grantor delivers a deed, executed in blank as to the grantee, under circumstances implying authority to the receiver to insert the grantee's name, such name may be inserted by him or by another authorized by him, so as to confer a title on an innocent purchaser.[4] So the rule that a parol authority is adequate to authorize an addition to a sealed instrument, after delivery, is sustained by many recent decisions.[5]

1 Davidson v. Cooper, 11 Mees. & W. 793; Burns v. Lynde, 6 Allen, 305; Bashford v. Pearson, 9 Allen, 387; Bragg v. Fessenden, 11 Ill. 544; Enthoven v. Hoyle, 13 Com. B. 373.

2 Davidson v. Cooper, 11 Mees. & W. 793; Duncan v. Hodges, 4 McCord, 239; Smith v. Fellows, 9 Jones & S. 36.

3 Duncan v. Hodges, 4 McCord, 239; Hudson v. Revett, 5 Bing. 368.

4 Swartz v. Ballou, 47 Iowa, 188; 29 Am. Rep. 470.

5 Inhabitants etc. v. Huntress, 53 Me. 89; Cooper v. Page, 62 Me. 192; Bridgeport Bank v. Railroad Co. 30 Conn. 231; Gourdin v. Commander, 6 Rich. 497; Devin v. Himer, 29 Iowa, 297; Field v. Stagg, 52 Mo. 534; 14 Am. Rep. 435; Van Etten v. Evanson, 28 Wis. 33; 9 Am. Rep. 486; Schintz v. McManamy, 33 Wis. 299; and see Drury v. Foster,

2 Wall. 24. But see *contra:* Upton *v.* Archer, 41 Cal. 85; 10 Am. Rep. 266; Viser *v.* Rice, 33 Tex. 135; Preston *v.* Hull, 23 Gratt. 600; 14 Am. Rep. 153; Squire *v.* Whitton, 1 H. L. Cas. 333.

§ 280. Effect of alterations, etc. — Alterations, erasures, or interlineations made in any part of the deed before delivery will not vitiate the deed,[1] but they should in some way be noted upon the instrument itself, in order to show that they were made before delivery.[2] If made after delivery, either by the party benefited or by a stranger, if in a material part, the effect will be to avoid the deed, unless done by the consent of the maker.[3] And the question whether the alterations, etc., apparent on the face of the deed were made prior or subsequent to the delivery thereof, is to be settled by the jury upon all the evidence in the case.[4] But upon this point the decisions are not harmonious—some holding that such alterations will be presumed to have been made at the time of the making of the deed,[5] while others hold the presumption to be that they were made after execution and delivery;[6] and that the law imposes upon the party who claims under the instrument the burden of explaining the alterations.[7] And especially if an alteration appears suspicious on its face, and is not duly noted on the paper, the burden of proof is upon the party who claims that the alteration was genuine.[8]

1 Shep. Touch. 55; Ravisies *v.* Alston, 5 Ala. 297; Wickes *v.* Caulk, 5 Har. & J. 36. See § 279, *ante;* Davis *v.* Fuller, 12 Vt. 178; 36 Am. Dec. 334.

2 See Acker *v.* Ledyard, 8 Barb. 514; Arrison *v.* Harmstead, 2 Pa. St. 191; Britton *v.* Stanley, 4 Whart. 114; O'Donnell *v.* Harmon, 3 Daly, 424; and see Collins *v.* Collins, 51 Miss. 311; 24 Am. Rep. 632.

3 Withers *v.* Atkinson, 1 Watts, 237; Cleaton *v.* Chambliss, 6 Rand. 86; Huntington *v.* Finch, 3 Ohio St. 445; Bliss *v.* McIntyre, 18 Vt. 466; Letcher *v.* Bates, 6 Marsh. J. J. 524; 22 Am. Dec. 92; Warring *v.* Williams, 8 Pick. 322; Lewis *v.* Payn, 8 Cowen, 71; Den *v.* Wright, 2 Halst, 175; 11 Am. Dec. 546. Compare Pope *v.* Chafee, 14 Rich. Eq. 69; Gordon *v.* Sizer, 39 Miss. 805; Langdon *v.* Paul, 20 Vt. 217. An alteration, though made subsequently to the execution of the deed, and feloniously, does not avoid the title: Jackson *v.* Jacoby, 9 Cowen, 125; and see Woods *v.* Hilderbrand, 46 Mo. 284; S. C. 2 Am. Rep. 513. A deed by husband and wife, altered after execution by the husband without authority of the wife, vitiates the deed: Stone *v.* Lord, 80 N. Y. 60. Compare Prettyman *v.* Goodrich, 23 Ill. 330.

4 Ely *v.* Ely, 6 Gray, 441; and see Smith *v.* McGowan, 3 Barb. 404;

Maybee v. Sniffin, 2 Smith E. D. 1; 16 N. Y. 560; Roberts v. Unger, 30 Cal. 676; Howard v. Colquhon, 28 Tex. 134; Co. Litt. 225 b; Knight v. Clements, 8 Ad. & E. 215.

5 Trowel v. Castle, 1 Keb. 22; Beaman v. Russell, 20 Vt. 205; Sirrine v. Briggs, 31 Mich. 443; Huntington v. Finch, 3 Ohio St. 445; Stoner v. Ellis, 6 Ind. 152; Bailey v. Taylor, 11 Conn. 531; McCormick v. Fitzmorris, 39 Mo. 34; Farnsworth v. Sharp, 4 Sneed, 55; Doe v. Bingham, 4 Barn. & Adol. 672.

6 Morris v. Vanderen, 1 Dall. 67; Paine v. Edsell, 19 Pa. St. 180; White v. Haas, 32 Ala. 432; Cole v. Hills, 44 N. H. 227; Provost v. Gratz, 1 Peters C. C. 365; Craft v. White, 35 Miss. 455.

7 Jordon v. Stewart, 23 Pa. St. 244; Dow v. Jewell, 18 N. H. 340; United States v. Linn, 1 How. 104; Montag v. Linn, 23 Ill. 551.

8 O'Donnell v. Harmon, 3 Daly, 424; and see Pringle v. Chambers, 1 Abb. Pr. 58.

§ 281. Who may convey by.—As a general rule, all persons who are capable of holding real property, and who are not under some disability, as infancy,[1] coverture,[2] or the like, may freely convey the same by deed.[3] So corporations, which are artificial persons, are capable of conveying away real property by deed.[4] A person deaf and dumb from his nativity, if of sufficient capacity in other respects, is not legally incapable of executing a deed.[5] And the tendency of modern adjudications is to regard a deed, if not absolutely binding, as voidable rather than void.[6] All persons having any estate, right, title, or interest, either at law or in equity, in the subject-matter of a deed, must join in the conveyance, or their rights will remain.[7]

1 See § 284, *post*.

2 See § 283, *post*.

3 See Den v. Clark, 2 Ired. 23; Walt v. Maxwell, 5 Pick. 217; Dicken v. Johnson, 7 Ga. 484; Zouch v. Parsons, 3 Burr. 1805; § 285, *post*.

4 See Boone Corp. § 54.

5 Brown v. Brown, 3 Conn. 299; 8 Am. Dec. 187.

6 See Dennett v. Dennett, 44 N. H. 538; Miles v. Lingerman, 24 Ind. 387; Hovey v. Hobson, 53 Me. 451; Den v. Clark, 2 Ired. 23.

7 2 Greenl. Cruise, 308. See Lithgow v. Kavenagh, 9 Mass. 161; Adams v. Bean, 12 Mass. 137; Scott v. Whipple, 5 Me. 336; Giles v. Pratt, 2 Hill (S. C.) 439. A deed by a person disseized is valid against every one but the disseizor and his privies: McMahan v. Bowe, 114 Mass. 140; 19 Am. Rep. 321; Livingston v. Proseus, 2 Hill, 526; University of Vt. v. Joslyn, 21 Vt. 52.

§ 282. Who may be grantees.—In order to render a conveyance of land valid, there must be a grantee

competent to take it.[1] But less capacity is required to take than to make a grant, and by the rule of the common law, all persons whatever may be grantees in a deed, because it is supposed to be for their benefit.[2] And a person may take an estate in remainder by a deed to which he is not a party.[3] A corporation may be a grantee, unless expressly restrained by its charter;[4] but in this country corporations are usually limited in the acts of incorporation as to the value or amount of real property which they may hold.[5] At common law, a wife cannot be the immediate grantee of her husband, but she may take an estate from him through the medium of the statute of uses.[6] And equity will uphold a conveyance from husband to wife, though no trustee has been interposed to hold for the wife's use.[7] An alien may be grantee in a deed, and may hold until "office found."[8]

1 See Bundy *v.* Birdsall, 29 Barb. 31; Hulick *v.* Scovil, 4 Ill. 191; Miller *v.* Chittenden, 2 Iowa, 368.

2 2 Greenl. Cruise, 319; and see Sutton *v.* Cole, 3 Pick. 332; Parker *v.* Stuckert, 2 Miles, 278; Halluck *v.* Bush, 2 Root, 26; 1 Am. Dec. 60; Mitchell *v.* Ryan, 3 Ohio St. 377. Compare Bennett *v.* Waller, 23 Ill. 97.

3 Hornbeck *v.* Westbrook, 9 Johns. 73.

4 Boone Corp. § 40; Kenny *v.* Wallace, 24 Hun, 478. A deed of land to the trustees *de facto* of an unincorporated religious society does not convey any title to the society: Bundy *v.* Birdsall, 29 Barb. 31. See Thomas *v.* Marshfield, 10 Pick. 364.

5 Boone Corp. § 40.

6 See Voorhees *v.* Presbyterian Church, 17 Barb. 103; Sweat *v.* Hall, 8 Vt. 187; Abbott *v.* Hurd, 7 Blackf. 510; Shepard *v.* Shepard, 7 Johns. Ch. 57; § 151, *ante*.

7 Wallingford *v.* Allen, 10 Peters, 583; Dale *v.* Lincoln, 62 Ill. 22; Majors *v.* Everton, 89 Ill. 56; 31 Am. Rep. 65.

8 Jackson *v.* Lunn, 3 Johns. Cas. 109; Fairfax *v.* Hunter, 7 Cranch, 603; Sheaffe *v.* O'Neil, 1 Mass. 256; Crane *v.* Reeder, 21 Mich. 24; 4 Am. Rep. 430; Sands *v.* Lynham, 27 Gratt. 291; 21 Am. Rep. 343; and see § 19, *ante*.

§ 283. Conveyances by married women. — By the rule of the common law, all deeds executed by a married woman are absolutely void,[1] even as against her heirs.[2] And formerly, in England, the only mode in which a married woman could alienate her lands was by fine and recovery.[3] This mode was never in use in the

United States;[4] but the general rule here is, that a married woman, if of lawful age, may convey her real estate, or release all her interest in her husband's lands, by a deed executed jointly with her husband.[5] And by the aid of enabling acts in many of the States, she may convey her lands without her husband, as freely as if she were unmarried.[6] But unless executed in the precise mode prescribed by statute, the conveyance will be void.[7]

1 Shep. Touch. 56; 2 Greenl. Cruise, 315, 316; Bressler *v.* Kent, 61 Ill. 426; 14 Am. Rep. 67; Ezelle *v.* Parker, 41 Mo. 520; Warner *v.* Crouch, 14 Allen, 163; Dunham *v.* Wright, 53 Pa. St. 167.

2 Matthews *v.* Puffer, 19 N. H. 443; Concord Bank *v.* Bellis, 10 Cush. 276; Lowell *v.* Daniels, 2 Gray, 161.

3 Bressler *v.* Kent, 61 Ill. 426; 14 Am. Rep. 67; Albany Fire Ins. Co. *v.* Bay, 4 N. Y. 9. By statute 3 & 4 Will. 4, c. 74, for abolishing fines and recoveries, provision is made whereby a married woman may now join with her husband in making a deed of her estate: see 2 Greenl. Cruise, 315, note. She may pass her separate real estate by deed as a *feme sole:* Pride *v.* Bubb, Law R. 7 Ch. App. 64; 1 Eng. Rep. 426.

4 See Jackson *v.* Gilchrist, 15 Johns. 115; Durant *v.* Ritchie, 4 Mason, 54.

5 2 Kent Com. 150; Fowler *v.* Shearer, 7 Mass. 14; Lithgow *v.* Kavanagh, 9 Mass. 172; Allen *v.* Hooper, 50 Me. 374; Davey *v.* Turner, 1 Dall. 11; and see Richardson *v.* Wyman, 62 Me. 280; 16 Am. Rep. 459; Maloney *v.* Horan, 49 N. Y. 111; 10 Am. Rep. 335; Ridgeway *v.* Masting, 23 Ohio St. 294; 13 Am. Rep. 251.

6 See Yale *v.* Dederer, 18 N. Y. 271; White *v.* Wager, 25 N. Y. 333; Price *v.* Osborn, 34 Wis. 40. She may convey her real estate acquired before as well as after the marriage, without the joining of the husband in the conveyance: McKesson *v.* Stanton, 50 Wis. 297; 36 Am. Rep. 850.

7 See Reaume *v.* Chambers, 22 Mo. 54; Morrison *v.* Wilson, 13 Cal. 498; Bressler *v.* Kent, 61 Ill. 426; 14 Am. Rep. 67.

§ 284. Deeds of infants.—The rule as established by the modern decisions appears to be, that the deed of an infant, conveying his land for a valuable consideration, is voidable and not void;[1] and that the right to avoid the deed on coming of age is a personal privilege to the minor and his heirs.[2] But an infant's deed, without consideration, is absolutely void, and not simply voidable.[3] And a person purchasing land of an infant, knowing the fact, must and ought to take the risk of the avoidance of the contract by the infant after arriving at maturity.[4] Nor can a restoration of the consideration be exacted as a

condition to a disaffirmance of the contract on the part of the infant.[5] It has however been held, that if an infant would avoid his deed he must do so within a reasonable time after coming of age.[6] And when delay is coupled with acts indicating an intention to confirm, or which cause injury to others, or secure benefits to himself, it becomes proof of confirmation more or less potent, according to the accompanying acts and circumstances.[7] Thus, an infant's deed binds him, if, after coming of age, he knowingly suffers the grantee to make valuable improvements on the premises, without announcing his intention to avoid the deed.[8] But mere delay within the time allowed by the Statute of Limitations, uncoupled with any acts expressive of an intent to confirm, would not be sufficient for that purpose.[9]

1 Zouch *v.* Parsons, 3 Burr. 1805; Tucker *v.* Moreland, 10 Peters, 58; Robinson *v.* Weeks, 56 Me. 106; Kendell *v.* Lawrence, 22 Pick. 540; and see Harner *v.* Dipple, 31 Ohio St. 72; 29 Am. Rep. 496.

2 Kendell *v.* Lawrence, 22 Pick. 540. But compare Chandler *v.* Simmons, 97 Mass. 508.

3 Swafford *v.* Ferguson, 3 Lea, 292; 31 Am. Rep. 639.

4 Jackson *v.* Carpenter, 11 Johns. 539; Boody *v.* McKenney, 23 Me. 524; Dublin etc. Railway *v.* Black, 8 Ex. 181; 16 Eng. L. & Eq. 558; Sims *v.* Everhardt, 102 U. S. 300.

5 Green *v.* Green, 69 N. Y. 553; 25 Am. Rep. 233.

6 See Wallace *v.* Lewis, 4 Har. (Del.) 75; Sims *v.* Everhardt, 102 U. S. 300; 2 Kent Com. 236.

7 Dana *v.* Coombs, 6 Me. 89; Boody *v.* McKenney, 23 Me. 524; and see Robbins *v.* Eaton, 10 N. H. 561; Chapin *v.* Shafer, 49 N. Y. 407; Wheaton *v.* East, 5 Yerg. 41.

8 Davis *v.* Dudley, 70 Me. 236; 35 Am. Rep. 318; and see Highley *v.* Barron, 40 Me. 103; Thompson *v.* Strickland, 52 Miss. 574; Wallace *v.* Lewis, 4 Har. (Del.) 75; Gillespie *v.* Bailey, 12 W. Va. 70; 29 Am. Rep. 445.

9 Davis *v.* Dudley, 70 Me. 236; 35 Am. Rep. 318; Vaughan *v.* Parr, 20 Ark. 600; McMurray *v.* McMurray, 66 N. Y. 175; Huth *v.* Railway etc. Co. 56 Mo. 202; Moore *v.* Abernethy, 7 Blackf. 442.

§ 285. By persons of unsound mind.—A deed executed by an idiot, or person of non-sane mind, who is under guardianship, is void;[1] but a deed made by such a person not under guardianship passes a seizin, and is regarded as voidable only, and not void.[2] And it is held that where a person of apparently sound mind, and not

known to be otherwise, executes a deed, equity will not interfere to set aside such deed, where the grantee cannot be put in *statu quo*, or where the benefit received by the grantor is actual, and of a durable character.[3] A deed cannot be impeached on the ground that the grantor, at the time of execution, was a monomaniac on the subject of religion.[4] And a habitual drunkard is not incompetent to execute a deed;[5] he is simply incompetent upon proof that at the time his understanding was clouded, or his reason dethroned by actual intoxication.[6]

1 Wait *v.* Maxwell, 5 Pick. 217; 16 Am. Dec. 391.

2 Wait *v.* Maxwell, 5 Pick. 217; Arnold *v.* Richmond Iron Works, 1 Gray, 434; Jackson *v.* Gumaer, 2 Cowen, 552; Breckinridge *v.* Ormsby, 1 Marsh. J. J. 247; Eaton *v.* Eaton, 8 Vroom, 108; 18 Am. Rep. 717; and see Hovey *v.* Hobson, 53 Me. 451; Miles *v.* Lingerman, 24 Ind. 387. Some of the cases however hold, that a deed regular on its face will be declared void whenever the testimony submitted shows that the person executing it was at the time of its execution *non compos mentis:* Farley *v.* Parker, 6 Oreg. 105; 25 Am. Rep. 504; Van Deusen *v.* Sweet, 51 N. Y. 383.

3 Riggan *v.* Green, 80 N. C. 236; 30 Am. Rep. 77; and see Carr *v.* Holliday, 1 Dev. & B. Eq. 344; Molton *v.* Camroux, 2 Ex. 487; Arnold *v.* Richmond Iron Works, 1 Gray, 434; Eaton *v.* Eaton, 8 Vroom, 108; 18 Am. Rep. 717. Proceedings to recover land of which a deed was made while the grantor was insane, which deed has not since been ratified or affirmed, may be commenced without first restoring the consideration to the grantee: Gibson *v.* Soper, 6 Gray, 279.

4 Burgess *v.* Pollock, 53 Iowa, 273; 36 Am. Rep. 218.

5 Gardner *v.* Gardner, 22 Wend. 526; Peck *v.* Cary, 27 N. Y. 9. Compare Eaton *v.* Perry, 29 Mo. 96; Donelson *v.* Posey, 13 Ala. 752.

6 Van Wyck *v.* Brasher, 81 N. Y. 260. See Warnock *v.* Campbell, 25 N. J. Eq. 485; Freeman *v.* Statts, 8 N. J. Eq. 814; Belcher *v.* Belcher, 10 Yerg. 121.

§ 286. Conveyances by corporate bodies.—Corporations may, through the intervention of agents, execute conveyances of their realty.[1] But where the mode in which the property of a corporation shall be conveyed is prescribed by the charter, or any general statute, that mode must be pursued.[2]

1 Boone Corp. § 54; Leggett *v.* New Jersey Manuf. etc. Co. 1 Saxt. Ch. 541; 23 Am. Dec. 728; Central Gold Min. Co. *v.* Platt, 3 Daly, 263; Treadwell *v.* Salesbury Manuf. Co. 7 Gray, 393; Bellows *v.* Todd, 39 Iowa, 209.

2 Isham *v.* Bennington Iron Co. 19 Vt. 230; Boone Corp. § 54. See § 282, *ante.*

§ 287. Aliens as parties to.—Even at common law an alien may take real property by purchase,[1] and he may hold the same against all the world but the State.[2] And a conveyance by an alien who was once well seized of an indefeasible estate vests such estate in his grantee, subject only to be defeated by the State.[3]

1 Burk *v.* Brown, 2 Atk. 399; Elmendorf *v.* Carmichael, 3 Litt. 472; 14 Am. Dec. 86; Sands *v.* Lynham, 27 Gratt. 291; 21 Am. Rep. 348; and see § 19, *ante*.

2 See §§ 19, 282, *ante*. Crane *v.* Reeder, 21 Mich. 24 Am. Rep. 348.

3 Scanlan *v.* Wright, 13 Pick. 523; 25 Am. Dec. 344. The disability of alienage has been removed by statute in many of the States: see § 19, *ante*; Hall *v.* Hall, 81 N. Y. 130; and, in England, alien friends are now enabled by statute to take and hold lands for residence or business for twenty-one years: Stat. 7 & 8 Vict. c. 66.

§ 288. Effect of duress on deeds.—A deed executed under duress is not strictly void, but only voidable;[1] and a deed cannot be avoided on this ground except upon clear and conclusive evidence.[2] So in many cases it may be necessary for a party to move promptly in disaffirming the deed, or he may lose the right.[3] Actual violence is not necessary to constitute duress,[4] and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient to destroy free agency, without which there can be no contract.[5] But duress by mere advice, direction, influence, and persuasion is unknown to the law.[6] A mere threat to sue upon an agreement to convey in fee, whereby a conveyance of a lesser estate in the same land is procured, is not such duress as will avoid the conveyance.[7] If a party under duress promises to execute a deed for the purpose of regaining his liberty, and afterward, while at liberty, he performs his promise, it is nevertheless voidable.[8] To establish a ratification, it must appear that the duress or fear has ceased, which may not be until long after the threats are made.[9]

1 Worcester *v.* Eaton, 13 Mass. 377; and see Edwards *v.* Handley, Hardin, 602; 3 Am. Dec. 745; Watkins *v.* Baird, 6 Mass. 506; 1 Am. Dec. 170; Deputy *v.* Staplefordd, 19 Cal. 302.

2 Brown v. Peck, 2 Wis. 261; Davis v. Fox, 59 Mo. 125. The duress must have been at the instigation of the grantee: Talley v. Robinson, 22 Gratt. 888; Green v. Scranage, 19 Iowa, 461.

3 Murphy v. Paynter, 1 Dill. 333; Bazemore v. Freeman, 58 Ga. 276; Doolittle v. McCullough, 7 Ohio St. 299; Lyon v. Waldo, 36 Mich. 345.

4 Baker v. Morton, 12 Wall. 150; and see Radich v. Hutchins, 95 U. S. 210; Brumagim v. Tillinghast, 18 Cal. 265; Olivari v. Menger, 39 Tex. 76.

5 Baker v. Morton, 12 Wall. 150; Watkins v. Baird, 6 Mass. 506; 1 Am. Dec. 170; Miller v. Miller, 68 Pa. St. 486. A father may avoid a mortgage which he has been induced to sign by threats of the prosecution and imprisonment of his son: Harris v. Carmody, 131 Mass. 51.

6 Barrett v. French, 1 Conn. 354; 6 Am. Dec. 241; and see Atlee v. Backhouse, 3 Mees. & W. 642.

7 Harris v. Tyson, 24 Pa. St. 347; and see Snyder v. Braden, 58 Ind. 143.

8 Ormes v. Beadel, 2 DeGex, F. & J. 333. Compare Bissett v. Bissett, 1 Har. & McH. 211.

9 Taylor v. Jaques, 106 Mass. 291. A deed made by an agent under duress may be avoided by the principal: Cumming v. Ince, 11 Q. B. 112. And it seems that a deed executed by a wife through duress of her husband may be avoided by her: Brooks v. Berryhill, 20 Ind. 97; Kocourek v. Marak, 54 Tex. 201; 38 Am. Rep. 623; Eddie v. Slimmon, 26 N. Y. 12; Tapley v. Tapley, 10 Minn. 458. Compare Koehler v. Wilson, 40 Iowa, 183; McClintock v. Cummins, 3 McLean, 158; State v. Brantley, 27 Ala. 44; Remington v. Wright, 43 N. J. L. 451; Lefebvre v. Dutruit, 51 Wis. 326; 37 Am. Rep. 833.

§ 289. Fraud and undue influence.—Fraud, when established, will vitiate any transaction, however solemn.[1] And it is a rule of universal application, that whatever fraud creates, justice will destroy.[2] Fraud renders a deed absolutely void as against the party defrauded, and not voidable merely;[3] and a deed void in part for fraud is void *in toto*.[4] Where there is fraud in the execution of a deed, whereby it is rendered wholly void, the fraud may be taken advantage of in a court of law as well as in a court of equity.[5] But where the alleged fraud was only in obtaining the deed, or in the inducement to its execution, a court of equity alone can give relief.[6] Such courts are especially charged with the cognizance of trust relations, such as subsist between trustee and beneficiary, parent and child, guardian and ward, etc.;[7] and a deed procured by undue influence, through an improper exercise of such relations, will be set aside.[8] In all cases of this kind, the court throws the

burden of proof on the party who sets up the transaction against the person whom he was bound to protect,[9] and will insist upon a full and complete communication of all material circumstances.[10] Fair argument and persuasion, exerted for the purpose of obtaining a deed, will not have the effect to avoid its execution.[11]

1 Hall *v.* Irwin, 66 N. Y. 649; Jones *v.* Emery, 40 N. H. 348; Gage *v.* Gage, 29 N. H. 533; Somers *v.* Pumphrey, 24 Ind. 231; Laughton *v.* Harden, 68 Me. 208.

2 Vreeland *v.* New Jersey Stone Co. 29 N. J. Eq. 188. But no person will be allowed to allege his own fraud to avoid his own deed: Doe *v.* Roberts, 2 Barn. & Ald. 367; Walton *v.* Bonham, 24 Ala. 513.

3 Jackson *v.* Summerville, 13 Pa. St. 359; and see Miller's Appeal, 30 Pa. St. 478; Chess *v.* Chess, 1 Penr. & W. 32; 21 Am. Dec. 350; Butler *v.* Haskell, 4 Desaus. Eq. 707. A conveyance executed for a valuable and adequate consideration will be upheld against the creditors of the grantor, however fraudulent his purpose may have been, if the grantee had no knowledge thereof: Prewitt *v.* Wilson, 103 U. S. 22.

4 Thomas *v.* Thomas, 1 Litt. 62; 13 Am. Dec. 220; Young *v.* Pate, 4 Yerg. 164; Goodhue *v.* Berrien, 2 Sand. Ch. 630.

5 Thomas *v.* Thomas, 1 Litt. 62; 13 Am. Dec. 220; Hopkins *v.* Beard, 6 Cal. 664; Holley *v.* Younge, 27 Ala. 203; Stryker *v.* Vanderbilt, 25 N. J. L. 482; Escherick *v.* Traver, 65 Ill. 379; and see Schuylkill County *v.* Copley, 67 Pa. St. 380; Van Deusen *v.* Sweet, 51 N. Y. 383.

6 Thomas *v.* Thomas, 1 Litt. 62; 13 Am. Dec. 220. Fraud as to the consideration cannot be inquired into in a court of law: Escherick *v.* Traver, 65 Ill. 379; Stryker *v.* Vanderbilt, 25 N. J. L. 482.

7 See Hogton *v.* Hogton, 15 Beav. 278; 1 Story Eq. Jur. § 322; Corbit *v.* Smith, 7 Iowa, 60; Bayliss *v.* Williams, 6 Cold. 440; Fuller *v.* Fuller, 40 Ala. 301; Turner *v.* Turner, 44 Mo. 535; Gilmore *v.* Burch, 7 Oreg. 374; 3 Am. Rep. 547.

8 Bayliss *v.* Williams, 6 Cold. 440; and see Jacox *v.* Jacox, 40 Mich. 473; 29 Am. Rep. 710; Darlington's Appeal, 86 Pa. St. 512; 27 Am. Rep. 726; Boyd *v.* De la Montagnie, 73 N. Y. 499; 29 Am. Rep. 197. The rule, that a party seeking to set aside a contract must place the opposite party in *statu quo*, has no application in the case of a deed which has been obtained by fraud and without consideration: Freeman *v.* Reagan, 26 Ark. 373; and see § 284, *ante*.

9 Harrison *v.* Guest, 6 DeGex, M. & G. 424; Berkmeyer *v.* Kellerman, 32 Ohio St. 239; 30 Am. Rep. 577.

10 Gordon *v.* Gordon, 3 Swanst. 41; Bergen *v.* Udall, 31 Barb. 25.

11 Taylor *v.* Taylor, 6 Ired. Eq. 124. Compare Bowles *v.* Watham, 54 Mo. 261; Hunter *v.* Walters, Law R. 7 Ch. App. 75. A *bona fide* purchaser from a fraudulent grantee will hold the estate at law against the original grantor: Somes *v.* Brewer, 2 Pick. 184; White *v.* Graves, 107 Mass. 328; Wood *v.* Mann, 1 Sum. 509.

§ 290. Names of parties.—It is one of the requisites of a good deed that the parties thereto be truly and sufficiently described.[1] But it is not absolutely necessary to name the grantee, if he be described or designated in

some way so as to be distinguished from all others.[2] A deed that does not in any way designate the grantee,[3] or a deed to a fictitious person, passes no title.[4] The omission or insertion of a middle name or its initial is immaterial;[5] and a mistake in the christian name, if the deed explains who is intended, does not affect the execution of the deed.[6] And where the grantee had possession of a deed in which his christian name was left blank, he was permitted to show *aliunde* who was intended.[7] If the description of a party suits two persons, the one claiming under the deed must show that he is the one intended.[8] A deed containing nothing more than a surname to indicate the grantee would be void.[9] And where a deed is made to a partnership in the firm name, and the surnames only of some of the partners are mentioned in the deed, such partners cannot take as grantees;[10] but those fully named will hold in trust for themselves and their associates.[11] A deed must be executed in the name of the grantor,[12] but it seems that he need not be named as such in the deed, provided he signs it.[13] A deed by a corporation must be executed in the corporate name.[14] A grant to "the inhabitants of a neighborhood," without a more definite description of the grantees, would be void for uncertainty.[15] A deed to a wife, though without any christian name, or even by a wrong name, may be sustained.[16]

1 See Finch's Case, 6 Rep. 65; Middleton *v.* Findla, 25 Cal. 80; Boone *v.* Moore, 14 Mo. 420; Newton *v.* McKay, 29 Mich. 1; Hoffman *v.* Porter, 2 Brock. 156; Hornbeck *v.* Westbrook, 9 Johns. 73.

2 Ready *v.* Kearsley, 14 Mich. 225; Morse *v.* Carpenter, 19 Vt. 613; Hogan *v.* Page, 2 Wall. 607. Compare Hunter *v.* Watson, 12 Cal. 363; Huss *v.* Stephens, 52 Pa. St. 232.

3 Garnett *v.* Garnett, 7 Mon. 545; Chase *v.* Palmer, 29 Ill. 306.

4 Muskingum Turnp. *v.* Ward, 13 Ohio, 120. But where the owner of real estate executed a deed thereof to a fictitious grantee, and then under the name of such grantee executed another deed thereof to another person, it was held that the latter got good title: David *v.* Williamsburgh etc. Ins. Co. 83 N. Y. 265; 38 Am. Rep. 418.

5 Franklin *v.* Talmadge, 5 Johns. 84; Games *v.* Stiles, 14 Peters, 322.

6 See 1 Wood Conv. 172; 2 Wash. 566; Jackson *v.* Root, 18 Johns. 60; Tustin *v.* Faught, 23 Cal. 237. A contract or obligation may be

entered into by a person by any name he may choose to assume. The law only looks to the identity of the individual, and when that is clearly established, the act will be binding upon him: Petition of Snook, 2 Hilt. 566.

7 Fletcher *v.* Mansur, 5 Ind. 269; and see Zann *v.* Haller, 71 Ind. 136; 36 Am. Rep. 193.

8 Grand Gulf R. R. *v.* Bryan, 16 Miss. 234.

9 Fanshawe's Case, F. Moore, 229. Compare Irwin *v.* Longworth, 20 Ohio, 581.

10 Beaman *v.* Whitney, 20 Me. 413; and see Chamberlain *v.* Bussey, 5 Me. 164.

11 Beaman *v.* Whitney, 20 Me. 413; Moreau *v.* Safferans, 3 Sneed, 595. Compare McCauley *v.* Fulton, 44 Cal. 355; Murray *v.* Blackledge, 71 N. C. 492.

12 Hatch *v.* Barr, 1 Ham. (Ohio) 390. Where a person, with intent to convey title, executes a conveyance of property in a name not his own, he is bound by the name he thus adopts, which will be considered as his name *pro hac vice*, and the conveyance is effectual to vest title in the grantee: David *v.* Williamsburgh etc. Ins. Co. 83 N. Y. 265; Rev'g S. C. 7 Abb. N. C. 47.

13 Elliot *v.* Sleeper, 2 N. H. 525. But compare Catlin *v.* Ware, 9 Mass. 218; Peabody *v.* Hewett, 52 Me. 33.

14 Boone Corp. § 54.

15 Thomas *v.* Marshfield, 10 Pick. 368; and see Jackson *v.* Sisson, 2 Johns. Cas. 321. Compare Foster *v.* Lane, 30 N. H. 305; Reformed Church *v.* Veeder, 4 Wend. 494.

16 Den *v.* Hay, 1 N. J. 174; and see Scanlan *v.* Wright, 13 Pick. 523.

§ 291. Date.—It is the common and correct practice to insert a date in a deed, as indicating the time of its execution and delivery.[1] But the date is no part of the substance of the deed, and the presumption that the deed was delivered and took effect on the day of its date[2] may be rebutted, and the true time of the delivery shown by competent evidence.[3] Where the date in the body of a deed was exactly one year prior to the date at the foot thereof, the latter was held to be the true date of the execution of the deed.[4]

1 Osbourn *v.* Rider, Cro. Jac. 135; M'Kinney *v.* Rhodes, 5 Watts, 343; County of Henry *v.* Bradshaw, 20 Iowa, 355; Woodman *v.* Smith, 37 Me. 25; Blake *v.* Fash, 44 Ill. 302.

2 Lee *v.* Insurance Co. 6 Mass. 219; Breckenridge *v.* Todd, 3 Mon. 52; 16 Am. Dec. 83; Gardiner *v.* Collins, 3 Mason, 398; Banning *v.* Edes, 6 Minn. 402; Meech *v.* Fowler, 14 Ark. 29.

3 Sweetzer *v.* Lowell, 33 Me. 446; Harris *v.* Norton, 16 Barb. 264; Genter *v.* Morrison, 31 Barb. 155.

4 Morrison *v.* Caldwell, 5 Mon. 426; and see Colquhoun *v.* Atkinson, 6 Munf. 550. A date in figures would seem to be less regarded than one in a different form: Jackson *v.* Schoonmaker, 2 Johns. 233.

§ 292. Consideration.—A consideration is usually stated to be one of the essentials of a good deed.[1] But a deed entered into without any consideration is valid and effectual at law as between the parties,[2] and it cannot be avoided by the grantor if he should become dissatisfied with the transaction.[3] The law regards it as his own folly to have made such a conveyance, and leaves him to bear the consequences without means of redress.[4] The consideration of a deed may be either good or valuable,[5] but it must not be against the policy of the law, the principles of justice, or the rules of morality.[6] A good consideration is founded upon natural love and affection between near blood relations;[7] such, for instance, as subsists between parent and child,[8] or between a grandparent and grandchild.[9] And a deed from husband to wife, "for natural love and affection," was held to vest the title, as between the parties, in the wife.[10] Deeds made upon good consideration only are regarded as merely voluntary,[11] and if the intent and purpose was to defraud, they are void as against creditors and subsequent *bona fide* grantees for value;[12] but valid and effectual as to the grantor and his heirs, and all other persons claiming under him in privity of estate with notice of the fraud.[13] A valuable consideration is one founded on something deemed valuable, as money, goods, services, or the like, which the law esteems an equivalent given for the grant.[14] Marriage is also a valuable consideration;[15] so of support and maintenance;[16] and the receipt and use by the husband of the wife's property is a sufficient consideration for the conveyance of land to her use;[17] so a precedent debt constitutes a valuable consideration for a deed;[18] and the seduction of an innocent woman by a pretended marriage is a valuable consideration for a deed subsequently made to her and her children.[19] It is not essential that a consideration be expressed in the deed,[20] and if it becomes necessary to prove one, it may be shown by parol.[21] So, in general, the consideration clause in a deed is not within

the rule excluding parol evidence in contradiction of a writing.[22] Its effect is to estop the grantor from alleging that the deed was executed without consideration, and thereby avoiding it;[23] but for every other purpose it is open to explanation, and may be varied by parol proof.[24]

1 See 4 Kent, 462; 2 Greenl. Cruise, 121, 122; Life Ins. Co. *v.* Cole, 4 Fla. 359; Chiles *v.* Coleman, 2 Marsh. A. K. 296; 12 Am. Dec. 396. Equity will not lend its aid to carry a deed into execution unless it is supported by some consideration: Osgood *v.* Strode, 1 Ves. Jr. 54; 2 P. Wms. 245; Acker *v.* Phœnix, 4 Paige, 305; Bunn *v.* Wintrop, 1 Johns. Ch. 336; Story Eq. Jur. 793.

2 Rogers *v.* Hillhouse, 3 Conn. 398; Den *v.* Hawks, 5 Ired. 30; Cathcart *v.* Robinson, 5 Peters, 264; Miller *v.* Marckle, 21 Ill. 152; Campbell *v.* Whitson, 68 Ill. 240; 18 Am. Rep. 553; Laberee *v.* Carleton, 53 Me. 211.

3 Green *v.* Thomas, 11 Me. 318; Ryan *v.* Brown, 18 Mich. 196; Prescott *v.* Hayes, 43 N. H. 593; Doe *v.* Hurd, 7 Blackf. 510.

4 Campbell *v.* Whitson, 68 Ill. 240; 18 Am. Rep. 553; Taylor *v.* King, 6 Munf. 358.

5 4 Kent Com. 464; 2 Greenl. Cruise, 323; Potter *v.* Gracie, 58 Ala. 303; 29 Am. Rep. 748.

6 Hubert *v.* Maze, 2 Bos. & P. 371; Florentine *v.* Wilson, Hill & D. 303; Bank of United States *v.* Owens, 2 Peters, 527; Potter *v.* Gracie, 58 Ala. 303; 29 Am. Rep. 748; and see Walker *v.* Gregory, 36 Ala. 180; Walraven *v.* Jones, 1 Houst. 355; Toler *v.* Armstrong, 4 Wash. 297; 11 Wheat. 258; Insurance Co. *v.* Grim, 32 Ind. 249.

7 4 Kent Com. 464; and see Eckman *v.* Eckman, 68 Pa. St. 460; Hanson *v.* Buckner, 4 Dana, 251; Randall *v.* Ghent, 19 Ind. 271.

8 Pierson *v.* Armstrong, 1 Iowa, 282.

9 Stovall *v.* Barnett, 4 Litt. 207; Huss *v.* Stephens, 51 Pa. St. 282. Compare Borum *v.* King, 37 Ala. 606. But not between parent and illegitimate child: Blount *v.* Blount, 2 Law R. (N. C.) 587; and see Cains *v.* Jones, 5 Yerg. 249.

10 Stafford *v.* Stafford, 41 Tex. 111.

11 Washband *v.* Washband, 27 Conn. 424.

12 Rockhill *v.* Spraggs, 9 Ind. 32; Dunlap *v.* Hawkins, 59 N. Y. 340; Beal *v.* Warren, 2 Gray, 447; Babcock *v.* Eckler, 24 N. Y. 623; Cathcart *v.* Robinson, 5 Peters, 264; Bongars *v.* Block, 81 Ill. 186; 25 Am. Rep. 276; Campbell *v.* Whitson, 68 Ill. 240; 18 Am. Rep. 553. It is the settled law of Alabama, that a voluntary conveyance is absolutely void as to the existing creditors of the grantor, and no inquiry is indulged into the intent with which it is made: Potter *v.* Gracie, 58 Ala. 303; 29 Am. Rep. 748. The intent is held to be material only when the rights of *subsequent* creditors are involved; then, if it is tainted with actual fraud, it is void: Potter *v.* Gracie, 58 Ala. 303; 29 Am. Rep. 748. Compare Crawford *v.* Kirksey, 55 Ala. 282; 28 Am. Rep. 704; Claflin *v.* Mess, 30 N. J. Eq. 211; Budd *v.* Atkinson, 30 N. J. Eq. 530; Keep *v.* Keep, 7 Abb. N. C. 240.

13 Miller *v.* Marckle, 21 Ill. 152; Campbell *v.* Whitson, 68 Ill. 240; 18 Am. Rep. 555; Walker *v.* Gregory, 36 Ala. 180; Potter *v.* Gracie, 58 Ala. 303; 29 Am. Rep. 748; Story Eq. Jur. § 371.

14 2 Blackst. Com. 296; Ellinger *v.* Crowl, 17 Md. 361; Seward *v.* Jackson, 8 Cowen, 406.

15 Thompson *v.* Thompson, 17 Ohio St. 649; Ellinger *v.* Crowl, 17

Md. 361; Herring *v.* Wickham, 29 Gratt. 628; 26 Am. Rep. 405; Andrews *v.* Jones, 10 Ala. 400; Jones' Appeal, 62 Pa. St. 324; Prewit *v.* Wilson, 103 U. S. 22. And a mere voluntary deed is made good and effectual by a subsequent marriage: Sterry *v.* Arden, 1 Johns. Ch. 271; Verplank *v.* Sterry, 12 Johns. 536; Smith *v.* Allen, 5 Allen, 458.

16 Shontz *v.* Brown, 27 Pa. St. 123; Camp *v.* Gifford, 67 Barb. 434; McGill *v.* Woodward, 1 Tread. 468; and compare Spaulding *v.* Hollenbeck, 30 Barb. 292; Hutchinson *v.* Hutchinson, 46 Me. 154; Sanders *v.* Wagonseller, 19 Pa. St. 248.

17 Hill *v.* West, 8 Ohio, 222.

18 McMahan *v.* Morrison, 16 Ind. 172; and see Busey *v.* Reese, 38 Md. 264.

19 Doe *v.* Horn, 1 Ind. 363; and see Herring *v.* Wickham, 29 Gratt. 628; 26 Am. Rep. 405. But where the grantees were respectively the mistress and the illegitimate child of the grantor, and the deed recited that it was made on divers good considerations, and for kindness felt by the grantor toward the grantees, parol evidence was held to be inadmissible to prove a valuable consideration; and that, although intended as a provision for the maintenance of the grantees, and not in consideration of future cohabitation, the deed was void as to existing creditors of the grantor: Potter *v.* Gracie, 58 Ala. 303; 29 Am. Rep. 748.

20 Cunningham *v.* Freeborn, 11 Wend. 248; Jackson *v.* Dillon, 2 Over. 261. In Kansas, an instrument in form a conveyance, whether under seal or not, and duly *signed* by the grantor, imports a consideration: Ruth *v.* King, 9 Kan. 17.

21 Wood *v.* Beach, 7 Vt. 522; Jackson *v.* Pike, 9 Cowen, 69; and see Jack *v.* Dougherty, 3 Watts, 151; Redfield etc. Manuf. Co. *v.* Dysart, 62 Pa. St. 62.

22 McCrea *v.* Purmort, 16 Wend. 460; 30 Am. Dec. 103; Bennett *v.* Solomon, 6 Cal. 137; Rhine *v.* Ellen, 36 Cal. 371; Hannran *v.* Oxley, 23 Wis. 519; Clapp *v.* Tirrell, 20 Pick. 250; Morris *v.* Tillson, 81 Ill. 616.

23 Adams *v.* Hull, 2 Denio, 306; Anthony *v.* Harrison, 14 Hun, 210; Bryant *v.* Hunter, 6 Bush, 75; Goward *v.* Waters, 93 Mass. 599.

24 Stackpole *v.* Robbins, 47 Barb. 210; 48 N. Y. 665; Hebbard *v.* Haughian, 70 N. Y. 54; and see Henderson *v.* Fullerton, 54 How. Pr. 425; Sanford *v.* Sanford, 5 Lans. 493; 61 Barb. 302; Bassett *v.* Bassett, 55 Me. 127; Johnson *v.* Boyles, 26 Ala. 576; Peck *v.* Vandenberg, 30 Cal. 57. A deed executed by a party in whom title is vested, expressing a valuable consideration, need not be supported by showing what other reason, in addition to the will of the party, led to its execution: Rockwell *v.* Brown, 54 N. Y. 210. Compare Gaines *v.* Stiles, 14 Peters, 322.

§ 293. Signing and sealing.—It is another requisite of a good deed that it must be signed and sealed by the party whose deed it is;[1] though, if sealed and delivered, it seems that signing is not necessary, unless in cases under the statute of frauds, and deeds executed under powers.[2] Execution by the grantee, when the deed contains no engagement on his part, serves no other purpose than to show his assent to the grant;[3] and such assent, in the absence of evidence to the contrary, is always

presumed.[4] There can be no deed without a seal,[5] and by a seal at common law is meant "an impression upon wax or wafer, or some other tenacious substance capable of being impressed."[6] A scrawl with a pen is not a seal within the meaning of the law.[7] And a slit in a parchment, with a ribbon through it, will not make a seal.[8] But a seal in the United States is becoming more and more regarded as a mere formality;[9] and in some of the States a scrawl, with or without the letters "L. S." or the word "seal" within it, serves instead of the common-law seal.[10] In other States an impression on the paper only, without wax or wafer, is sufficient.[11] Several persons may bind themselves by one seal.[12] The seal of a corporation should be affixed by the officer to whom the custody of it is confided.[13]

1 2 Blackst. Com. 306; McDill *v.* McDill, 1 Dall. 64; Smith *v.* Evans, 1 Wils. 213; Chiles *v.* Conley, 2 Dana, 21; Clark *v.* Graham, 6 Wheat. 579.

2 Wright *v.* Wakeford, 17 Ves. 459; and see Sicard *v.* Davis, 6 Peters, 124; Mut. Benefit Life Ins. Co. *v.* Brown, 30 N. J. Eq. 193. But compare Ellis *v.* Smith, 1 Ves. Jr. 13.

3 Burt Real Prop. § 441.

4 Burt Real Prop. § 441; Thompson *v.* Leach, 2 Vent. 198; Alfred *v.* Lea, Cro. Eliz. 54; Tibbals *v.* Jacobs, 31 Conn. 428; Mitchell *v.* Ryan, 3 Ohio St. 377.

5 See Taylor *v.* Glaser, 2 Serg. & R. 502; Elwell *v.* Shaw, 16 Mass. 47; Jackson *v.* Wood, 12 Johns. 73; Deming *v.* Bullitt, 1 Blackf. 241; Chino *v.* Black, 4 McCord, 431. A seal is not necessary to the validity of a deed in Iowa: Swartz *v.* Ballou, 47 Iowa, 188; 29 Am. Rep. 470; and see Ruth *v.* King, 9 Kans. 17; Shelton *v.* Armor, 13 Ala. 647. Nor was a seal requisite under the civil law: see Stanley *v.* Green, 12 Cal. 166.

6 4 Kent. Com. 452; Warren *v.* Lynch, 5 Johns. 245; Perrine *v.* Cheeseman, 6 Halst. 174; 19 Am. Rep. 388; Tasker *v.* Bartlett, 5 Cush. 359; and see Adams *v.* Kerr, 1 Bos. & P. 360. An instrument will be treated as sealed where evidence of the intent to affix a seal is clear: McCarley *v.* Tippah County Supervisors, 58 Miss. 483; 38 Am. Rep. 338; but not merely because it contains a recital that it is sealed: Same *v.* Same, 58 Miss. 749.

7 Warren *v.* Lynch, 5 Johns. 245.

8 Duncan *v.* Duncan, 1 Watts, 322.

9 See Ortman *v.* Dixon, 13 Cal. 36; Marling *v.* Marling, 9 W. Va. 79; 27 Am. Rep. 535; Ashwell *v.* Ayres, 4 Gratt. 283.

10 See Comerford *v.* Cobb, 2 Fla. 418; Michener *v.* Kenny, Wright, 459; McRaven *v.* McGuire, 9 Smedes & M. 34; Long *v.* Ramsey, 1 Serg. & R. 72; United States *v.* Coffin, Bee, (Adm.) 140; Connolly *v.* Goodwin, 5 Cal. 220; Burton *v.* LeRoy, 5 Sawy. 510; Boone Corp. § 50.

11 See Pillow *v.* Roberts, 13 How. 473; Carter *v.* Burley, 9 N. H. 558.

In New York, an impression on the paper is not a seal, except in case of public officers and courts: Farmers' etc. Bank *v.* Haight, 3 Hill, 493.

12 Mackay *v.* Bloodgood, 9 Johns. 285; Lambden *v.* Sharp, 9 Humph. 224; Davis *v.* Burton, 3 Scam. 144; Townsend *v.* Hubbard, 4 Hill. 351; Bradford *v.* Randall, 5 Pick. 496.

13 Jackson *v.* Campbell, 5 Wend 575; and see Boone Corp. § 50.

§ 294. Execution by attorney.—The grantor may appoint another to be his agent or attorney to sign and seal the deed for him.[1] But in order to give validity to a deed executed by an agent or attorney, it is an indispensable requisite that it should be done in the name of the principal.[2] It must appear from the body of the deed that the principal is the grantor, and the deed must be signed with his name, and purport to be sealed with his seal.[3] The deed in some part must also show that its execution by the principal was done by the agent or attorney named.[4] In Maine, where a deed is executed by an agent or attorney, with authority therefor, and it appears by the deed that it was the intention of the parties to bind the principal, it must be regarded as the deed of the principal, though signed by the agent or attorney in his own name.[5] So, in Massachusetts and New Hampshire, lands belonging to the State may be conveyed by deed of authorized public agents in their own names as such;[6] and so of lands belonging to towns in the latter State.[7] Authority to the agent to execute a deed in behalf of his principal need not be given in express terms, but may be implied from the express power to sell;[8] the power to sell the lands of the principal necessarily implies and carries with it the power to execute a proper deed to carry the sale into effect.[9]

1 Ball *v.* Dunsterville, 4 Term Rep. 313; Rex *v.* Longnor, 1 Nev. & M. 576; and see Bartlett *v.* Drake, 100 Mass. 174; 1 Am. Rep. 101.

2 Elwell *v.* Shaw, 16 Mass. 42; Brinley *v.* Mann, 2 Cush. 337; Stinchfield *v.* Little, 1 Me. 231; Shanks *v.* Lancaster, 5 Gratt. 110; McDonald *v.* Bear River Co. 13 Cal. 235. Meagher *v.* Thompson, 49 Cal. 189; Berkeley *v.* Hardy, 8 Dowl. & R. 102.

3 Carter *v.* Chandron, 21 Ala. 72; Barger *v.* Miller, 4 Wash. C. C. 280; City of Providence *v.* Miller, 11 R. I. 272; 23 Am. Rep. 453.

4 Wood *v.* Goodridge, 6 Cush. 117; Butterfield *v.* Beall, 3 Ind. 203; Hunter *v.* Miller, 6 Mon. B. 612; Thurman *v.* Cameron, 24 Wend. 90;

and see McClure v. Herring, 70 Mo. 18; 35 Am. Rep. 404; Carpenter v. Farnsworth, 106 Mass. 561; 8 Am. Rep. 360; Haile v. Peirce, 32 Md. 327; 3 Am. Rep. 139; Doe v. Blacker, 27 Ga. 418; Northwestern Destilling Co. v. Brant, 69 Ill. 658; 18 Am. Rep. 631.

5 Inhabitants etc. v. Clark, 68 Me. 87; 28 Am. Rep. 22.

6 Ward v. Bartholomew, 6 Pick. 409; Thompson v. Carr, 5 N. H. 510; Magill v. Hinsdale, 6 Conn. 465.

7 Cofran v. Cockran, 5 N. H. 488.

8 Inhabitants v. Clark, 68 Me. 87; 28 Am. Rep. 22.

9 Valentine v. Piper, 22 Pick. 85; Marr v. Given, 23 Me. 55. The death of the principal revokes the authority to execute a deed: Harper v. Little, 2 Me. 14.

§ 295. Delivery of.—A delivery is essential to give effect to a deed, whether it be a conveyance founded upon a valuable consideration, or a mere voluntary conveyance.[1] A deed takes effect from the time of its delivery, and not from the time of the date;[2] though the date is presumptively the true time of its execution and delivery.[3] Without a delivery on the part of the grantor, which act is the consummation or the conveyance, all the preceding formalities are unavailable to impart validity to it as a solemn instrument of title.[4] And a valid deed once delivered cannot be defeated by any subsequent act, unless by virtue of a condition in the deed itself.[5] A complete delivery of a deed requires its acceptance by the grantee,[6] but such acceptance is always presumed, if the deed is found in the grantee's hands.[7] No set formulary of words or acts is necessary to a valid delivery;[8] it may be done by acts or words, or by both combined;[9] by the grantor himself, or by another by the grantor's authority precedent or assent subsequent;[10] and it may be made to the grantee personally, or to another authorized by the grantee to accept it,[11] or to a stranger with a subsequent ratification.[12] And it is immaterial, although the deed does not reach the grantee until after the death of the grantor, if it was previously left with a third person for his use.[13] But to constitute delivery good for any purpose, the grantor must divest himself of all power and dominion over the deed.[14] The term "delivery" implies a parting with the possession,

and a surrender of authority over the deed by the grantor at that time, either absolutely or conditionally:[15] *absolutely*, if the effect of the deed is to be immediate, and the title is to pass at once to the grantee; but *conditionally*, if the operation of the deed is made dependent on the performance of some condition, or the happening of some subsequent event.[16] If the deed is subject to be recalled by the grantor, before delivery to the grantee, it is held to be no delivery on the part of the grantor,[17] although he should die without recalling it.[18]

1 Jones *v.* Jones, 6 Conn. 111; 16 Am. Dec. 35; Rutledge *v.* Montgomery, 30 Ga. 641; Fisher *v.* Hall, 41 N. Y. 421, 422; Younge *v.* Gailbeau, 3 Wall. 641; Critchfield *v.* Critchfield, 24 Pa. St. 100; Stiles *v.* Brown, 16 Vt. 563; Armstrong *v.* Stovall, 26 Miss. 275.

2 Hood *v.* Brown, 2 Ohio, 267; Nay *v.* Mograin, 24 Kan. 75; Harrison *v.* Phillips Academy, 12 Mass. 455; Jackson *v.* Bard, 4 Johns. 230; Harman *v.* Oberdorper, 33 Gratt. 497; Egeny *v.* Woodard, 56 Me. 45. But see Smith *v.* Porter, 10 Gray, 67; Elsey *v.* Metcalf, 1 Denio, 323.

3 Jackson *v.* Bard, 4 Johns. 230; and see § 291, *ante*.

4 Goddard's Case, 2 Rep. 4 *b*; Younge *v.* Gailbeau, 3 Wall. 641; Brown *v.* Brown, 66 Me. 316; Fisher *v.* Beckworth, 30 Wis. 55. But the deed of a corporation need not be delivered, since the corporate seal gives perfection to the instrument without further ceremony: See Derby Canal *v.* Wilmot, 9 East, 360; Boone Corp. § 54. So title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not essential to pass the title: United States *v.* Schurz, 102 U. S. 378, 396.

5 Hawksland *v.* Gatchel, Cro. Eliz. 835; 2 Wash. Real Prop. 577; and see Prutsman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 582.

6 Ward *v.* Winslow, 4 Pick. 518; Stewart *v.* Redditt, 3 Md. 67; Corner *v.* Baldwin, 16 Minn. 172; Best *v.* Brown, 25 Hun, 223. Compare Commonw. *v.* Jackson, 10 Bush, 424.

7 Chandler *v.* Temple, 4 Cush. 285; Newlin *v.* Beard, 6 W. Va. 110; Jones *v.* Swayze, 42 N. J. L. 279; Southern Life Ins. Co. *v.* Cole, 4 Fla. 359; and see Little *v.* Gibson, 39 N. H. 505; Morris *v.* Henderson, 37 Miss. 501; Roberts *v.* Swearingen, 8 Neb. 363; Goodwin *v.* Ward, 6 Baxt. 107.

8 Thoroughgood's Case, 9 Rep. 136; Verplank *v.* Sterry, 12 Johns. 536; 7 Am. Dec. 348; Hatch *v.* Bates, 54 Me. 139; Mills *v.* Gore, 20 Pick. 36.

9 McClure *v.* Colclough, 17 Ala. 89; Burkholder *v.* Casad, 47 Ind. 418; Warren *v.* Sweet, 31 N. H. 332; Brown *v.* Brown, 66 Me. 316.

10 Brown *v.* Brown, 66 Me. 316; Foster *v.* Mansfield, 3 Met. 412; Marsh *v.* Austin, 1 Allen, 238; Hathaway *v.* Payne, 34 N. Y. 92; Duncan *v.* Pope, 47 Ga. 445; Stone *v.* Duvall, 77 Ill. 475; Morgan *v.* Hazelhurst Lodge, 53 Miss. 674; Stephens *v.* Rinehart, 72 Pa. St. 434; Matner *v.* Corliss, 103 Mass. 568; Fisher *v.* Hall, 41 N. Y. 416; Doe *v.* Knight, 5 Barn. & C. 671.

11 Cin. etc. R. R. Co. *v.* Iliff, 13 Ohio St. 235; Eckman *v.* Eckman, 55 Pa. St. 269; Hatch *v.* Bates, 54 Me. 136; Stilwell *v.* Hubbard, 20 Wend. 44.

12 Turner *v.* Whidden, 22 Me. 121; Brown *v.* Brown, 66 Me. 316; Fisher *v.* Hall, 41 N. Y. 423; Chamberlain *v.* Woodward, 22 Hun, 440.

13 Thatcher *v.* St. Andrew's Church, 37 Mich. 264; McLean *v.* Nelson, 1 Jones L. 396; Foster *v.* Mansfield, 3 Met. 412; Goodell *v.* Pierce, 2 Hill, 659. Compare Fisher *v.* Hall, 41 N. Y. 416; Prutsman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 592.

14 Younge *v.* Gailbeau, 3 Wall. 641; Parmelee *v.* Simpson, 5 Wall. 81; Tibbals *v.* Jacobs, 31 Conn. 428; Oliver *v.* Stone, 24 Ga. 63. It is with great reluctance that the courts will uphold a deed executed by the grantor, but retained in his possession to take effect after his death: See Jones *v.* Jones, 6 Conn. 111; 16 Am. Dec. 35; Huey *v.* Huey, 65 Mo. 689; Burnett *v.* Burnett, 40 Mich. 361; Stow *v.* Miller, 16 Iowa, 460; Newton *v.* Bealer, 41 Iowa, 334; Davis *v.* Williams, 57 Miss. 843; Mitchell *v.* Ryan, 3 Ohio St. 382; Shurtleff *v.* Francis, 118 Mass. 154; Walker *v.* Walker, 42 Ill. 311; Patterson *v.* Snell, 67 Me. 559; Ruckman *v.* Ruckman, 32 N. J. Eq. 259.

15 Prutsman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 592; and see Bary *v.* Anderson, 22 Ind. 39; Merrills *v.* Swift, 18 Conn. 257; Jones *v.* Swayze, 42 N. J. L. 279.

16 Prutsman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 592; and see Hagood *v.* Harley, 8 Rich. 325; Henrichsen *v.* Hodgen, 67 Ill. 179; Kane *v.* Machin, 17 Miss. 387; Gibson *v.* Partee, 2 Dev. & B. 530.

17 Fitch *v.* Bunch, 30 Cal. 213; Cook *v.* Brown, 34 N. H. 460; Jacobs *v.* Alexander, 19 Barb. 243.

18 Brown *v.* Brown, 66 Me. 316; Prutsman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 592. But compare Belden *v.* Carter, 4 Day, 66; 4 Am. Dec. 185; Woodward *v.* Camp, 22 Conn. 461; Hathaway *v.* Payne, 34 N. Y. 106.

§ 296. Delivery of, as an escrow.—When a deed is delivered to a third person, to be held until the performance of some condition or the happening of some event, it is termed a conditional delivery, or delivery *in escrow*.[1] And a delivery *in escrow* is, and can only be, made by placing the deed in the hands of a third person,[2] to be kept by him until the performance of some condition or conditions by the grantee or some one else, or until the happening of some event;[3] and the title only passes on performance of the condition or the happening of the event,[4] except in certain cases where, by fiction of law, the writing is allowed to take effect from the first delivery.[5] Thus, in case the grantor should die before condition performed, and it is afterward performed, the law from necessity will give effect to the first delivery, and make it the deed of the grantor from that time.[6] The condition or contingency upon which a deed is delivered *in escrow* may be expressed in writing, or rest in parol, or be partly in writing and in part parol.[7]

1 Prutsman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 594; Harkreader *v.* Clayton, 56 Miss. 383; 31 Am. Rep. 369; and see Shep. Touch. 58; John-

son *v.* Baker, 4 Barn. & Ald. 440; Jackson *v.* Catlin, 2 Johns. 248; State Bank *v.* Evans, 3 Green, (N. J.) 155; 28 Am. Dec. 490; Stone *v.* Duvall, 77 Ill. 475.

2 Dawson *v.* Hall, 2 Mich. 390; Miller *v.* Fletcher, 27 Gratt. 403; 21 Am. Rep. 356; Johnson *v.* Branch, 11 Humph. 521; Ordinary etc. *v.* Thatcher, 12 Vroom, 403; 32 Am. 225; Brown *v.* Reynolds, 5 Sneed, 639; Harkreader *v.* Clayton, 56 Miss. 383; 31 Am. Rep. 369; Hagood *v.* Harley, 8 Rich. 325. But the apparent intent of the parties is, in some cases, sustained against a strict construction of the technical rule, that delivery to the agent of the grantee cannot be *in escrow:* see Watkins *v.* Nash, Law R. 20 Eq. Cas. 262; 13 Eng. Rep. 781; Ford *v.* James, 2 Abb. Ct. App. 159; Dietz *v.* Parish, 12 Jones & S. 190; Gilbert *v.* Fire Ins. Co. 23 Wend. 43.

3 Prutzman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 594. Compare Stephens *v.* Rinehart, 72 Pa. St. 434; Wallace *v.* Harris, 32 Mich. 380. Many of the authorities distinguish between cases where the future delivery is to depend upon the payment of money, or the performance of some other condition, and cases where it is to depend on the happening of some contingency, holding that the former is an *escrow*, but that the latter will be deemed the grantor's deed presently: see Wheelwright *v.* Wheelwright, 2 Mass. 454; 3 Am. Dec. 66; Hathaway *v.* Payne, 34 N. Y. 92. But the distinction will not apply in all cases, since it would frequently happen to defeat the manifest intention of the parties which it is everywhere conceded should govern: see Prutsman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 592; Stone *v.* Duvall, 77 Ill. 475.

4 Duncan *v.* Pope, 47 Ga. 445; Hinman *v.* Booth, 21 Wend. 267; Jackson *v.* Rowland, 6 Wend. 666; 22 Am. Dec. 557; Dyson *v.* Bradshaw, 23 Cal. 528. The moment the condition has been performed or the event has happened, the grantee is entitled to the possession of the deed, and thenceforth the depository is regarded as the mere agent or trustee for the grantee: Prutzman *v.* Baker, 30 Wis. 644; 11 Am. Rep. 592; Couch *v.* Meeker, 2 Conn. 302; 7 Am. Rep. 274. But no title vests in a grantee who obtains possession of an *escrow* without performance of the condition: Doe *v.* Knight, 5 Barn. & C. 671; Everts *v.* Agnes, 4 Wis. 356; 6 Wis. 457. And a *bona fide* purchaser from him, after the death of the grantor, acquires no title: Harkreader *v.* Clayton, 56 Miss. 383; 31 Am. Rep. 369; and see Chipman *v.* Tucker, 38 Wis. 43; 20 Am. Rep. 1. But see Blight *v.* Schenck, 10 Pa. St. 285; Souverbye *v.* Arden, 1 Johns. Ch. 240.

5 See Jackson *v.* Rowland, 6 Wend. 666; 22 Am. Dec. 557; Shirley *v.* Ayres, 14 Ohio, 307.

6 Perryman's Case, 3 Coke, 84; Hatch *v.* Hatch, 9 Mass. 310.

7 Stanton *v.* Miller, 58 N. Y. 192. See also Jackson *v.* Sheldon, 22 Me. 569; Millet *v.* Parker, 2 Met. (Ky.) 616; Nichols *v.* Nichols, 28 Vt. 228; Murray *v.* Stair, 2 Barn. & C. 82.

§ 297. Attestation.—Every deed should be duly attested by witnesses, thus affording an easy and effectual mode of establishing its authenticity.[1] But attestation is not of the essence of a deed, at common law,[2] and when not required by the terms of the constitution of a power, or by statute, a deed is valid without attesting witnesses.[3] In many of the States one or more witnesses are required by statute, in order to give validity to a

deed;[4] and if a statute requires all deeds to be executed in the presence of two witnesses, a deed executed in the presence of one only is void.[5] It is not necessary that the witness should have actually seen the party execute the deed;[6] if the latter signs his name alone, and then calls witnesses, before whom he acknowledges the instrument, it is sufficient.[7] A witness, though blind, should be produced to prove the execution of the deed, since he may still be able to give important evidence respecting the transaction.[8]

1 See Dole *v.* Thurlow, 12 Met. 166.

2 Garrett *v.* Lister, 1 Lev. 25; Craig *v.* Pinson, Cheves, 272; Long *v.* Ramsay, 1 Serg. & R. 72; Menley *v.* Zeigler, 23 Tex. 88; Dole *v.* Thurlow, 12 Met. 166.

3 Dole *v.* Thurlow, 12 Met. 166. Where there are no subscribing witnesses to a deed, the execution may be proved by proving the handwriting of the party: Swire *v.* Bell, 5 Term Rep. 371.

4 See 2 N. Y. Rev. Stat. 22; Kentucky Bank *v.* Jones, 59 Ala. 123; Winsted Sav. Bank *v.* Spencer, 26 Conn. 195; Crane *v.* Reeder, 21 Mich. 24; 4 Am. Rep. 430; Shirley *v.* Fearne, 33 Miss. 653; Richardson *v.* Bates, 8 Ohio St. 261; Genter *v.* Morrison, 31 Barb. 155; 4 Kent Com. 457.

5 Clark *v.* Graham, 6 Wheat. 577; Stone *v.* Ashley, 13 N. H. 38; and see Merwin *v.* Camp, 3 Conn. 35; § 277, *ante*.

6 Parke *v.* Mears, 2 Bos. & P. 217.

7 Parke *v.* Mears, 2 Bos. & P. 217; Jackson *v.* Phillips, 9 Cowen, 113.

8 Rees *v.* Williams, 1 DeGex & S. 314; Cronk *v.* Frith, 9 Car. & P. 197; 2 Moody & R. 262; 2 Greenl. Cruise, 342, n. But see Pedler *v.* Paige, 1 Moody & R. 258.

§ 298. Requisite reading of.—If a party to the execution of a deed is unable to read it, and he requires it to be read to him, and it is not done, or is read falsely, this is sufficient to avoid the deed.[1] But a grantor is presumed to know the contents of the deed which he signs,[2] and also the date.[3] And he will not be permitted to avoid it on the ground that he was ignorant of its legal effect.[4] And if it be agreed by collusion between parties that the deed should be read falsely, on purpose to avoid it, it will nevertheless bind the fraudulent party.[5]

1 Hallenbeck *v.* Dewitt, 2 Johns. 404; Jackson *v.* Hayner, 12 Johns. 473.

2 Kimball *v.* Eaton, 8 N. H. 391.

3 See Androscoggin Bank v. Kimball, 10 Cush. 373.
4 Manser's Case, 2 Rep. 3.
5 2 Greenl. Cruise, 328; Rex v. Longnor, 1 Nev. & M. 576.

§ 299. Formal parts of.—The several parts of a deed are formally distinguished by early writers as: the premises, the *habendum*, the *tenendum*, the *reddendum*, condition, warranty, and covenant.[1] The premises embrace that part of the deed preceding the *habendum*, including date,[2] names of parties,[3] consideration,[4] recitals,[5] description of property,[6] and the exceptions, if any.[7] The *habendum* declares what estate or interest is granted, though this may be also done in the premises, and it is not therefore regarded as an essential part of a deed.[8] But if no particular estate is mentioned in the premises, the *habendum* then becomes efficient to declare the intention.[9] The *tenendum* was formerly used to express the tenure by which the estate granted was to be held, and is now joined to the *habendum*.[10] The *reddendum* clause is that whereby the grantor reserves some new thing to himself out of what he had before granted, such as rent.[11] The condition is a clause of contingency, upon the happening of which the estate granted may be defeated.[12] Then follow the warranty and covenants;[13] and the whole deed concludes with a brief form of words connecting its contents with the signatures and seals of the parties, and those with the date.[14] It is not necessary in order to pass a title that a deed should be written in the order above stated;[15] and the parts of a deed which are really essential may be expressed in few words.[16] Brief forms of deeds have been prescribed by statute in some of the States,[17] and generally in the United States the form of a conveyance is very simple.[18]

1 Co. Litt. 6 *a*, 7 *a*; Shep. Touch. 74; 2 Greenl. Cruise, 327, 328; 2 Wash. Real Prop. 311.
2 § 291, *ante*.
3 § 290, *ante*.
4 § 292, *ante*.

5 § 300, *post.*

6 § 301, *post.*

7 § 303, *post.* The premises determine the subject-matter of the deed: see Thompson *v.* Thompson, 9 Ind. 323; Sumner *v.* Williams, 8 Mass. 174.

8 See 4 Kent Com. 468; Stockton *v.* Martin, 2 Bay, 471; Kenney *v.* Wallace, 24 Hun, 478; Nightingale *v.* Hidden, 7 R. I. 118; Tyler *v.* Moore, 42 Pa. St. 387; Farquharson *v.* Eichelberger, 15 Md. 63; Kenworthy *v.* Tullis, 3 Ind. 96.

9 Berry *v.* Billings, 44 Me. 416; compare Jamaica Pond *v.* Chandler, 9 Allen, 168.

10 2 Greenl. Cruise, 327; Shep. Touch. 52.

11 Co. Litt. 47 *a*; and see Case *v.* Haight, 3 Wend. 635; State *v.* Wilson, 42 Me. 9; Doe *v.* Lock, 4 Nev. & M. 807.

12 See § 202, *et seq.*; Laberee *v.* Carleton, 53 Me. 213.

13 § 316, *et seq.*, *post.* See Sisson *v.* Seabury, 1 Sum. 262.

14 2 Greenl. Cruise, 328; Burt. Real Prop. § 514.

15 See Burt Real Prop. § 514.

16 Co. Litt. 7 *a*; Shep. Touch. 75; 4 Kent Com. 461.

17 See Funk *v.* Creswell, 5 Iowa, 68; Miller *v.* Miller, Meigs, 484; Matthews *v.* Ward, 10 Gill & J. 449; Cal. Civ. Code, § 1092.

18 See 4 Kent Com. 461.

§ 300. Recitals and their effect.—The recitals in a deed is a narrative of such facts, assurances, and agreements as are necessary to explain the reasons upon which the present transaction is founded.[1] Though not an essential part of a deed, it is usually inserted, and often affords a valuable clew to the intention of the parties.[2] But recitals will not be permitted to control the operative part of the deed, if the plain intent would be thereby defeated.[3] All the parties to a deed, their privies in blood, in estate, and in law, are bound by recitals which legitimately appertain to the subject-matter thereof;[4] but strangers are not generally bound by the recitals in a deed.[5] Nor will a party be prejudiced by recitals in a deed which was executed under judicial compulsion.[6] A misrecital will not invalidate a deed,[7] and especially if it be immaterial and irrelevant.[8] And where a fact is recited, as a marriage, which proves to be false, though the intention of the parties may have been founded on the mistake, the conveyance is good.[9] Mistakes of facts in recitals of deeds given by officers who sell under judi-

cial authority may be explained.[10] A party to a deed is not bound by recitals in other deeds, through which he derived title.[11]

1 See 2 Greenl. Cruise, 624; Allen *v.* Holton, 20 Pick. 463; Farrell *v.* Hilditch, 5 Com. B. N. S. 840. It usually commences with the formal word "whereas," which if there are several recitals in connection is repeated, "and whereas": See 1 Broom & Had. Com. (Walt's ed.) 727.

2 Moore *v.* Magrath, Cowp. 9; Allen *v.* Holton, 20 Pick. 464; Cholmondeley *v.* Clinton, 2 Barn. & Ald. 625; Powell *v.* Powell, 5 Dana, 170.

3 Schermerhorn *v.* Negus, 2 Hill, 335; Cole *v.* Patterson, 25 Wend. 456; Bottrell *v.* Summers, 2 Younge & J. 407.

4 Robbins *v.* McMillan, 26 Miss. 434; Scott *v.* Douglass, 7 Ohio, 227; Carver *v.* Jackson, 4 Peters, 83; Kaine *v.* Denniston, 22 Pa. St. 202; Rankin *v.* Warner, 2 Lea, (Tenn.) 502; Jackson *v.* Parkhurst, 9 Wend. 209; McBurney *v.* Cutler, 18 Barb. 203; and see § 246, *ante*.

5 Whitaker *v.* Garnett, 3 Bush, 402.

6 McDougald *v.* Doherty, 11 Ga. 570.

7 Lewen *v.* Mody, Cro. Jac. 127; 3 Leon. 135; 2 Greenl. Cruise, 624.

8 Lewen *v.* Mody, Cro. Jac. 127; 3 Leon. 135.

9 Boughton *v.* Sanilands, 2 Taunt. 342; Burt. Real Prop. § 338.

10 Glover *v.* Ruffin, 6 Ohio, 255. Compare Brown *v.* Goodwin, 1 Abb. N. C. 452. A recital in a deed that the consideration has been paid is only *prima facie* evidence of payment: Parker *v.* Foy, 43 Miss. 260; 5 Am. Rep. 484; and see § 292, *ante*.

11 Carpenter *v.* Buller, 8 Mees. & W. 209; Doe *v.* Shelton, 3 Ad. & E. 265; Wilkins *v.* Dingley, 29 Me. 73; Griggs *v.* Smith, 7 Haist. 22.

§ 301. Description of property.—The description of the property or thing granted is of great importance, since its object is to define what the parties intend, the one to convey and the other to receive, by such deed.[1] It is therefore said that the description cannot be too minute and accurate;[2] for, if the subject of the grant cannot be ascertained from the description given, the grant itself becomes void.[3] But the intention of the parties to a deed, as collected from the instrument itself, will guide the court in determining what land is conveyed;[4] and uncertainty in the description will not avoid the deed, if that result can be averted by construction.[5] If there be but one description in the deed, that is to be strictly adhered to.[6] If there be more than one, and they are in conflict, that is to be adopted which is most certain and stable, if it sufficiently identifies the land.[7] If the

premises are first described generally, and afterwards particularly, and the two descriptions conflict, the latter will in general control.[8] But if the particular description is in any degree uncertain or obscure, and the general description is clear, definite, and certain, the particular description will not control it.[9] Of two conflicting descriptions equally stable and certain, that is to be preferred which is the more favorable to the grantee.[10] A description by words is preferred to a description by figures.[11] No part of a description is to be rejected if all the parts can stand consistently together.[12] But where, by rejecting a part that is false and impossible, a perfect description still remains, the false part should be rejected, and the deed upheld.[13] An evident omission in the description may be supplied by construction.[14]

1 See Burt. Real Prop. § 544; Barlow v. Rhodes, 1 Cromp. & M. 439; Raymond v. Longworth, 4 McLean, 481; Massie v. Long, 2 Ohio, 287.

2 2 Greenl. Cruise, 628.

3 United States v. King, 3 How. 773; Bailey v. White, 41 N. H. 337; Wofford v. McKinna, 23 Tex. 44; Campbell v. Johnson, 44 Mo. 247.

4 Mulford v. La Frame, 26 Cal. 88; Bass v. Mitchell, 22 Tex. 285; Stevens v. Mayor etc. 14 Jones & S. 274; Bosworth v. Sturtevant, 2 Cush. 392; Wendell v. Jackson, 8 Wend. 183; 22 Am. Dec. 635; Newson v. Pryor, 7 Wheat. 7; Hart v. Hawkins, 3 Bibb, 502; 6 Am. Dec. 666.

5 Andrews v. Murphy, 12 Ga. 431; Harvey v. Mitchell, 31 N. H. 575; Kruse v. Wilson, 79 Ill. 233; Stone v. Stone, 116 Mass. 279.

6 Den v. Graham, 1 Dev. & B. 76; 27 Am. Dec. 226.

7 Johnson v. McMillan, 1 Strob. 142; Gates v. Lewis, 7 Vt. 511; Abbott v. Abbott, 53 Me. 356; Piercy v. Crandall, 34 Cal. 334; Robertson v. Mosson, 26 Tex. 248; Den v. Graham, 1 Dev. & B. 76; 27 Am. Dec. 226.

8 2 Greenl. Cruise, 647; Jones v. Smith, 73 N. Y. 205; Gano v. Aldridge, 27 Ind. 294; McEowen v. Lewis, 26 N. J. L. 451.

9 Ela v. Card, 2 N. H. 175; 9 Am. Dec. 46; Haley v. Amestoy, 44 Cal. 132; Sawyer v. Kendall, 10 Cush. 241; Barney v. Miller, 18 Iowa, 460.

10 Vance v. Fore, 24 Cal. 435.

11 Bradshaw v. Bradbury, 64 Mo. 334; Montgomery v. Johnson, 31 Ark. 74.

12 Herrick v. Hopkins, 23 Me. 217; compare Lane v. Thompson, 43 N. H. 320.

13 Tubbs v. Gatewood, 26 Ark. 128; Beal v. Gordon, 55 Me. 482; Anderson v. Boughman, 7 Mich. 69; Wade v. Deray, 50 Cal. 376; Bond v. Fay, 12 Allen, 86; Raymond v. Coffey, 5 Oreg. 132; Shewalter v. Pirner, 55 Mo. 218; Thayer v. Torrey, 37 N. J. L. 339; Wendell v. Jackson, 8 Wend. 183; 22 Am. Dec. 635.

14 Hoffman v. Riehl, 27 Mo. 554.

§ 302. Boundaries, etc.—Boundary is "any separation, natural or artificial, which marks the confines or line of two contiguous estates."[1] Natural boundaries are natural objects remaining where they were placed by nature; as shores,[2] rivers, brooks, and creeks,[3] ponds,[4] beaches,[5] streets or highways,[6] and the like.[7] So a farm may be a monument to determine boundary;[8] so of a lot of a designated number in a city.[9] Artificial boundaries are those erected by man;[10] and if certain monuments are referred to in a description, which do not exist at the time, the parties may afterwards, in good faith and by mutual agreement, erect monuments as and for those intended in the description.[11] And this placing of monuments, and the consent and agreement of the parties in relation thereto, may be shown by parol.[12] As a general rule, natural objects, being of a more permanent and notorious character than artificial ones, are on that account to be preferred as monuments in forming boundary lines, where the two kinds conflict.[13] But where artificial monuments in any given case are obviously the more certain, they will be preferred.[14] And a description of boundaries by known and visible monuments, either natural or artificial, are generally preferred to a description by courses and distances and other measurements.[15] But this rule is not inflexible, and is never adhered to when it would lead to an absurdity;[16] and when there is anything in the description which shows that the courses and distances are right in themselves, they will prevail over monuments.[17] Monuments control only so far as is necessary to give effect to the apparent intent of the parties.[18] If there are no monuments, the land must be bounded by the courses and distances named in the patent or deed.[19] Generally speaking, distances yield to courses,[20] and quantity yields to all the descriptive particulars in a deed,[21] unless the intent to give only a certain quantity is very clear.[22] A plan or survey referred to in a deed controls courses and distances,[23] and even monuments,

where it best comports with the intent of the parties.[24] And as a general rule, if there is obviously a mistake in the description, an inferior means of location may control a higher.[25]

1 1 Bouv. Dict. 218.

2 Hathaway v. Wilson, 123 Mass. 361; Teschemacher v. Thompson, 18 Cal. 21; Littlefield v. Maxwell, 31 Me. 134; Martin v. O'Brien, 34 Miss. 21; McCullough v. Wainright, 14 Pa. St. 171; Yates v. Van De Bogert, 56 N. Y. 531.

3 Arnold v. Elmore, 16 Wis. 509; Child v. Starr, 4 Hill, 369; Hicks v. Coleman, 25 Cal. 142; Wheeler v. Spinola, 54 N. Y. 385; Primm v. Walker, 38 Mo. 94; Stanford v. Mangin, 30 Ga. 355.

4 Mill River etc. Co. v. Smith, 34 Conn. 462; Nostrand v. Durland, 21 Barb. 478; Wood v. Kelley, 30 Me. 47; Waterman v. Johnson, 13 Pick. 261; State v. Gilmanton, 9 N. H. 461.

5 Hodge v. Boothby, 48 Me. 71; Dana v. Jackson Street Wharf, 31 Cal. 120; East Hampton v. Kirk, 6 Hun, 257; 84 N. Y. 215.

6 Falls v. Reis, 74 Pa. St. 439; Gove v. White, 20 Wis. 432; Tibbetts v. Estes, 52 Me. 566; Dunham v. Williams, 37 N. Y. 251; Stevens v. Mayor etc. 14 Jones & S. 274; Chatham v. Brainard, 11 Conn. 60; Faris v. Phelan, 39 Cal. 612; Smith v. Howden, 14 Com. B. N. S. 398. Where land is sold bordering on a highway, the grantee takes the fee to the middle line thereof: Gear v. Barnum, 37 Conn. 229; Oxton v. Groves, 68 Me. 371; 28 Am. Rep. 75; Low v. Tibbetts, 72 Me. 92; 39 Am. Rep. 303; Stark v. Coffin, 105 Mass. 328; Salter v. Jonas, 10 Vroom, 469; 23 Am. Rep. 229. Compare Hoboken Land Co. v. Kerrigan, 30 N. J. L. 16; Palmer v. Dougherty, 33 Me. 507. But if the road-bed belongs to the government and not to the abutters, the deed carries title only to the roadside: White v. Godfrey, 97 Mass. 472; Dunham v. Williams, 37 N. Y. 251; Falls v. Reis, 74 Pa. St. 439; and see Kings County Fire Ins. Co. v. Stevens, 87 N. Y. 287.

7 See Stapleford v. Brinson, 2 Ired. 311; Hoffman v. Armstrong, 48 N. Y. 201; Patton v. Alexander, 7 Jones L. 603.

8 Cate v. Thayer, 3 Me. 71; and see Northrop v. Sumney, 27 Barb. 196; Flagg v. Thurston, 13 Pick. 145.

9 Sayers v. City of Lyons, 10 Iowa, 249; Rutherford v. Tracy, 48 Mo. 325; and see Powers v. Jackson, 50 Cal. 429.

10 See Call v. Barker, 12 Me. 320; Fleischfresser v. Schmidt, 41 Wis. 223; White v. Williams, 48 N. Y. 344.

11 Waterman v. Johnson, 13 Pick. 267; Emery v. Fowler, 38 Me. 99; Lerned v. Morrill, 2 N. H. 197; Makepeace v. Bancroft, 12 Mass. 469.

12 Waterman v. Johnson, 13 Pick. 267; and see Kellenn v. Smith, 65 Pa. St. 86; Kincaid v. Dormey, 47 Mo. 337.

13 Cox v. Freedley, 33 Pa. St. 124; Fulwood v. Graham, 1 Rich. 491; Bolton v. Laun, 16 Tex. 96; Higinbotham v. Stoddard, 72 N. Y. 94.

14 Lincoln v. Wilder, 29 Me. 169.

15 Fulwood v. Graham, 1 Rich. 491; Galvin v. Collins, 128 Mass. 525; Kalbfleisch v. Standard Oil Co. 43 N. J. L. 259; Woodward v. Nims, 130 Mass. 70; West v. Shaw, 67 N. C. 489; Dickson v. Wilson, 82 N. C. 487; Keenan v. Cavanaugh, 44 Vt. 268; Yates v. Van De Bogert, 56 N. Y. 526; Welder v. Hunt, 34 Tex. 44; Johnson v. Preston, 9 Neb. 474.

16 Davis v. Rainsford, 17 Mass. 207.

17 Higinbotham v. Stoddard, 72 N. Y. 94; and see Mizell v. Sim-

mons, 79 N. C. 182; Jones v. Burgett, 46 Tex. 284; Den v. Graham, 1 Dev. & B. Eq. 76; 27 Am. Dec. 226.

18 Johnson v. McMillan, 1 Strob. 143; Hamilton v. Foster, 45 Me. 32; White v. Luning, 93 U. S. 515.

19 Chinoweth v. Haskell, 3 Peters, 96; Grand Trunk Railway Co. v. Dyer, 49 Vt. 74; Drew v. Swift, 46 N. Y. 204; Sanders v. Godding, 45 Iowa, 463; Opdyke v. Stevens, 28 N. J. L. 83.

20 Bryan v. Beckley, Litt. Sel. Cas. 91; 12 Am. Dec. 276; Hoffman v. Riehl, 27 Mo. 554.

21 Wendell v. Jackson, 8 Wend. 183; 22 Am. Dec. 635; Clark v. Scammon, 62 Me. 47; Fuller v. Carr, 33 N. J. L. 157; Peay v. Briggs, 2 Mill (S. C.) 98; 12 Am. Dec. 656; Winans v. Cheney, 55 Cal. 267.

22 Kirkland v. Way, 3 Rich. 4; Pierce v. Faunce, 37 Me. 63.

23 See Heaton v. Hodges, 14 Me. 66; 30 Am. Dec. 731, 741, note; Birmingham v. Anderson, 43 Pa. St. 253; Powers v. Jackson, 50 Cal. 429; Kennebec Purchase v. Tiffany, 1 Me. 219; 10 Am. Dec. 60; Wolfe v. Scarborough, 2 Ohio St. 361.

24 Erskine v. Moulton, 66 Me. 276.

25 Newhall v. Ireson, 8 Cush. 595; Haynes v. Young, 36 Me. 557; Jones v. Burgett, 46 Tex. 484.

§ 303. Exception, reservation, etc.—An exception is "the taking of something out of the thing granted, which would otherwise pass by the deed";[1] and with respect to its place in the deed, it properly follows the description of the thing granted.[2] If land is conveyed in general terms, an exception of a specific part, as the trees or woods, is valid, and not repugnant to the grant.[3] But if the part excepted was specifically granted, as if a person grants ten acres in specific terms, excepting one of them, the exception is repugnant to the grant, and void.[4] The terms "exception" and "reservation" are often used indiscriminately, and the difference between them is, in many cases, very obscure.[5] But strictly speaking, an exception is always a part of the thing granted, and of a thing *in esse* at the time;[6] whereas, a reservation is something newly created or reserved out of the thing granted, that was not *in esse* before,[7] such as a rent,[8] or an easement.[9] A reservation cannot be made by parol;[10] and a reservation to a stranger is void.[11] It is for the benefit of the grantor and his successors, and not for that of persons claiming title to property not conveyed by the deed, and derived from other sources.[12] Gener-

ally, the same rules of construction apply to a reservation or implied grant as to an express grant.[18] The words, "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever through a culvert," were held to vest an estate for life only;[14] so of the words, "reserving to the grantor the use and control, etc., during his natural life";[15] and so of a reservation "for the use of our mother."[16] A reservation of stone, timber, etc., to be removed in a certain time, is held to expire with that time.[17] A reservation of mines implies support of the land;[18] so a reservation of wood and trees on the land implies a right of soil for their support and growth until cut, and a right to enter and cut them.[19] A reservation may be made in the premises, the clause of grant, the *habendum*, or *reddendum*.[20]

1 2 Wash. Real Prop. 639; and see Meserve *v.* Meserve, 19 N. H. 240; Roberts *v.* Robertson, 53 Vt. 690; 38 Am. Rep. 710; Richardson *v.* Palmer, 38 Vt. 223; Fancy *v.* Scott, 2 Moody & R. 335. The operation of an exception is to retain in the grantor some portion of his former estate, which by the exception is taken out of or excluded from the grant. Whatever is thus excluded remains in him as of his former right or title, because it is not granted: Ashcroft *v.* Eastern R. R. Co. 126 Mass. 196; 30 Am. Rep. 672.

2 See 2 Greenl. Cruise, 648; 2 Wash. Real Prop. 639.

3 Shep. Touch. 78; 4 Kent Com. 463; Sprague *v.* Snow, 4 Pick. 54; Munn *v.* Worrall, 53 N. Y. 44; 13 Am. Rep. 470; and see Cornwell *v.* Thurston, 59 Mo. 156; Crosby *v.* Montgomery, 38 Vt. 238; Dolan *v.* Trelevan, 31 Wis. 147; Moulton *v.* Trafton, 64 Me. 218; Stockwell *v.* Coulliard, 129 Mass. 231.

4 4 Kent Com. 463; and see Cutler *v.* Tufts, 3 Pick. 272; Wade *v.* Howard, 6 Pick. 500; Darling *v.* Crowell, 6 N. H. 421; Moore *v.* Fletcher, 16 Me. 63.

5 See Winthrop *v.* Fairbanks, 41 Me. 307; State *v.* Wilson, 42 Me. 9; Roberts *v.* Robertson, 53 Vt. 690; 38 Am. Rep. 710.

6 Co. Litt. 47 *b*; Whitaker *v.* Brown, 46 Pa. St. 197; Doe *v.* Lock, 4 Nev. & M. 807. Compare Hurd *v.* Curtis, 7 Met. 94; Durham etc. *v.* Walker, 2 Ad. & E. N. S. 940.

7 Doe *v.* Lock, 4 Nev. & M. 807; State *v.* Wilson, 42 Me. 9; Stockbridge Iron Co. *v.* Hudson Iron Co. 107 Mass. 290; Ashcroft *v.* Eastern R. R. Co. 126 Mass. 196; 30 Am. Rep. 672; Langdon *v.* Mayor etc. 6 Abb. N. C. 321, 322.

8 1 Wood Conv. 225; § 106, *ante*; Stockwell *v.* Coulliard, 129 Mass. 231.

9 Choate *v.* Burnham, 7 Pick. 274; Dyer *v.* Sandford, 9 Met. 395; and see Smith *v.* Ladd, 41 Me. 314; Reidinger *v.* Cleveland Iron Min. Co. 39 Mich. 30; Hart *v.* Conner, 25 Conn. 331. Minerals are a frequent subject of exception and reservation: see Gibson *v.* Tyson, 5 Watts, 34; Midland Railway *v* Checkley, Law R. 4 Eq. 19; § 6, *ante*.

10 Gibbons *v.* Dillingham, 5 Eng. 9; Wintermute *v.* Light, 46 Barb. 278; Turner *v.* Cool, 23 Ind. 56. But see Backenstoss *v.* Stahler, 33 Pa. St. 251.

11 Hornbeck *v.* Westbrook, 9 Johns. 73.

12 Moulton *v.* Faught, 41 Me. 298.

13 Ashcroft *v.* Eastern R. R. Co. 126 Mass. 196; 30 Am. Rep. 672; French *v.* Carhart, 1 N. Y. 96. Under a reservation of the right to "a supply of spring water by means of a hydraulic ram, wheel, or other process of forcing water," the party entitled may substitute a wind-mill for a wheel previously used: Richardson *v.* Clements, 89 Pa. St. 503; 33 Am. Rep. 784. Compare Onthank *v.* Lake Shore etc. R. R. Co. 71 N. Y. 194; 27 Am. Rep. 35.

14 Ashcroft *v.* Eastern R. R. Co. 126 Mass. 196; 30 Am. Rep. 672. A deed of land to A, her heirs and assigns forever, in consideration of love, good will, and affection, reserving the use of the lands during the grantor's natural life, conveys the fee *in præsenti*, subject to the life estate: Crib *v.* Rogers, 12 S. C. 564; 32 Am. Rep. 511; and see Coley *v.* Coley, 19 Conn. 114.

15 Richardson *v.* York, 14 Me. 216.

16 Keeler *v.* Wood, 30 Vt. 242.

17 Saltonstall *v.* Little, 90 Pa. St. 422; 35 Am. Rep. 683; Judevine *v.* Goodrich, 35 Vt. 19; Pease *v.* Gibson, 6 Me. 84; Boisaubin *v.* Reed, 2 Keyes, 323; 1 Abb. Ct. App. 161; Lancustrine etc. Co. *v.* Lake Guano etc. Co. 82 N. Y. 482. But see *contra*: Irons *v.* Webb, 12 Vroom, 203; 32 Am. Rep. 193; and compare Hort *v.* Stratton Mills, 54 N. H. 109; 20 Am. Rep. 119; Heflin *v.* Bingham, 56 Ala. 566; 28 Am. Rep. 776.

18 Caledonia etc. Min. Co. *v.* Sprot, 39 Eng. L. & Eq. 16; and see §§ 6, 146, *ante*.

19 Clap *v.* Draper, 4 Mass. 266; Howard *v.* Lincoln, 13 Me. 122; Putnam *v.* Tuttle, 10 Gray, 48.

20 Stambaugh *v.* Hollabaugh, 10 Serg. & R. 362.

§ 304. Rules of construction.—It is the province of the court to determine the force and legal effect of a deed,[1] and its legal effect is only deducible from its terms, according to the intent of the parties at the time of making it.[2] Questions relative to the location of the thing granted, the extent of its boundaries, the monuments intended by certain names, etc., are for the determination of the jury.[3] A leading rule of construction is, that the intention of the parties, as ascertained by the deed itself, will, if possible, be supported where this can be done consistently with the rules of law.[4] In order to arrive at the intention of the parties, the court will regard their situation and the circumstances attending the transaction.[5] The grammatical sense is not to be adhered to where a contrary intent is apparent;[6] and punctuation

will be wholly disregarded, unless all other means fail.[7] Ambiguous words are to be construed most favorably to the grantee;[8] and if the deed will inure several ways, he may elect which way to take it.[9] Words in a deed which are repugnant to the other parts of the deed, and to the general intent of the parties, will be rejected as insensible.[10] In order to effect the intention of the parties, "and" may sometimes be construed to mean "or," and *vice versa*.[11] Two deeds executed at the same time, between the same parties, and relating to the same subject-matter, should be construed together as one.[12] If a deed cannot operate in the way intended by the parties, it will be so construed as to operate, if possible, in some other way.[13] But if the words are so unmeaning or repugnant as to render the intention of the parties wholly unascertainable, the deed will be void for uncertainty.[14]

1 Piles *v.* Bouldin, 11 Wheat. 325; and see Thornberry *v.* Churchill, 4 Mon. 29; 16 Am. Dec. 125; Abbott *v.* Abbott, 51 Me. 575, 581; Hurley *v.* Morgan, 1 Dev. & B. 425; 28 Am. Dec. 579; Henderson *v.* Mayor etc. 8 Md. 352; Harris *v.* Doe, 4 Blackf. 377.

2 Frier *v.* Jackson, 8 Johns. 495; Kimball *v.* Temple, 25 Cal. 449; Long *v.* Wagoner, 47 Mo. 178; Stanley *v.* Greene, 12 Cal. 148; Hodges *v.* Strong, 10 Vt. 247; Richardson *v.* Palmer, 33 N. H. 218; Donahue *v.* Case, 61 N. Y. 631.

3 Frier *v.* Jackson, 8 Johns. 495; Clark *v.* Wagoner, 70 N. C. 706; Colton *v.* Seavey, 22 Cal. 496; Williston *v.* Morse, 10 Met. 17.

4 Parkhurst *v.* Smith, Willes, 332; Kenworthy *v.* Tullis, 3 Ind. 96; Mulford *v.* La Frame, 26 Cal. 83; Mills *v.* Catlin, 22 Vt. 98; Collins *v.* Lavelle, 44 Vt. 230; Allen *v.* Holton, 20 Pick. 463; Rutherford *v.* Tracey, 48 Mo. 325; 8 Am. Rep. 104; Jackson *v.* Myers, 3 Johns. 388; 3 Am. Dec. 504; Roberts *v.* Robertson, 53 Vt. 690; 38 Am. Rep. 710.

5 Wolfe *v.* Scarborough, 2 Ohio St. 361; Dunn *v.* English, 23 N. J. L. 126; Abbott *v.* Abbott, 53 Me. 356; and see Derby *v.* Hall, 2 Gray, 243; Mumford *v.* Getting, 7 Com. B. N. S. 305; Share *v.* Wilson, 9 Clark & F. 569.

6 Hancock *v.* Watson, 18 Cal. 137; Jackson *v.* Topping, 1 Wend. 388; Compare Grey *v.* Pearson, 6 H. L. Cas. 61; Deering *v.* Long Wharf, 25 Me. 51; Waugh *v.* Middleton, 8 Ex. 357.

7 Ewing *v.* Burnet, 11 Peters, 41; Bruensman *v.* Carroll, 52 Mo. 213; and compare White *v.* Smith, 33 Pa. St. 186; English *v.* McNair, 34 Ala. 40; Churchill *v.* Reamer, 8 Bush. 260.

8 Watson *v.* Boylston, 5 Mass. 411; Rung *v.* Schoneberger, 2 Watts. 23; 26 Am. Dec. 95; Hogg's Appeal, 22 Pa. St. 479; Johnson *v.* Webster, 31 Eng. L. & Eq. 98; Coffing *v.* Taylor, 16 Ill. 457. Compare Palmer *v.* Warren Ins. Co. 1 Story, 369; Falley *v.* Giles, 29 Ind. 114. Exceptions and restrictions are also to be construed favorably to the grantee: Duryea *v.* Mayor etc. 62 N. Y. 592.

9 Esty *v.* Baker, 50 Me. 325; Jackson *v.* Hudson, 3 Johns. 375; 3 Am. Dec. 500; Sharp *v.* Thompson, 100 Ill. 447; 39 Am. Rep. 61.

10 Jackson *v.* Clark, 7 Johns. 217; State *v.* Trask, 6 Vt. 355; 27 Am. Dec. 554; Worthington *v.* Hylyer, 4 Mass. 196; Ferguson *v.* Harwood, 7 Cranch, 414; and see White *v.* Gay, 9 N. H. 126; 31 Am. Dec. 224.

11 Co. Litt. 225 *a*; Jackson *v.* Topping, 1 Wend. 388; 19 Am. Dec. 515; White *v.* Crawford, 10 Mass. 183.

12 Cornell *v.* Todd, 2 Denio, 130; Kruse *v.* Prindle, 8 Oreg. 158; and see Pepper *v.* Haight, 20 Barb. 429; Gammon *v.* Freeman, 31 Me. 243; Jackson *v.* McKenney, 3 Wend. 233; 20 Am. Dec. 690.

13 2 Greenl. Cruise, 601; Doe *v.* Woodroffe, 10 Mees. & W. 608; Thomas *v.* Hatch, 3 Sum. 170; Bryan *v.* Bradley, 16 Conn. 474.

14 Mason *v.* White, 11 Barb. 173; Bean *v.* Thompson, 19 N. H. 290; Shackleford *v.* Bailey, 35 Ill. 387; United States *v.* King, 3 How. 773; Mesick *v.* Sunderland, 6 Cal. 297. Parol evidence is admissible to explain or remove *latent* ambiguities in a deed: Doolittle *v.* Blakesley, 4 Day, 265; 4 Am. Dec. 218; Atkinson *v.* Cummins, 9 How. 479; Glanton *v.* Anthony, 15 Ark. 543; Scanlon *v.* Wright, 13 Pick. 523; 25 Am. Dec. 344. But ambiguities *patent* or apparent upon the face of the deed cannot be explained by parol evidence, and must be removed, if at all, by a sound construction of the deed itself: Storer *v.* Freeman, 6 Mass. 435; Hardy *v.* Matthews, 38 Mo. 121; compare Dygert *v.* Platts, 25 Wend. 402; Clayton *v.* Nugent, 13 Mees. & W. 200.

§ 305. Construction of public grant.—In the case of a grant by the sovereign or government, the construction is always against the grantee, and the grant is taken most beneficially for the government.[1] But this rule is strictly applicable only in cases of real uncertainty or ambiguity in the terms of the grant;[2] and more properly to a grant of some prerogative right to an individual to be held by him as a franchise, and which is intended to become private property in his hands.[3] It has no application where the grant is made for a valuable consideration;[4] and generally speaking, a legislative grant of land in this country is to be fairly and liberally construed in favor of the grantee.[5]

1 Glidart *v.* Gladstone, 11 East, 685; Jackson *v.* Reeves, 3 Caines, 293; Kennedy *v.* M'Cartney, 4 Port. 141; Mayor etc. *v.* Ohio etc. R. R. Co. 26 Pa. St. 355. See § 250, *ante*.

2 Charles River Bridge *v.* Warren Bridge, 11 Peters, 569.

3 Martin *v.* Waddell, 16 Peters, 367, 411; Dubuque R. R. *v.* Litchfield, 23 How. 66, 88; Commonw. *v.* Roxbury, 9 Gray, 451, 492; Lansing *v.* Smith, 4 Wend. 9; 21 Am. Dec. 89.

4 Charles River Bridge *v.* Warren Bridge, 11 Peters, 569.

5 Croghan *v.* Nelson, 3 How. 187; Hyman *v.* Read, 13 Cal. 444; Stringer *v.* Young, 3 Peters, 320.

§ 306. What passes as appurtenant.—It is a well-established rule that the grant of a thing passes, as in-

cident thereto, everything necessary to its enjoyment, although the thing only is mentioned.[1] Everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance.[2] Thus a conveyance of land, by necessary legal consequence, carries the buildings thereon.[3] And the grant of a house passes the land on which it stands.[4] The grant of a mill and its "appurtenances" passes not merely the building, but all the land under the mill and necessary for its use;[5] and also the waters, flood-gates, etc., which are necessary for the enjoyment of the mill.[6] But the soil of a way immemorially used for the purpose of access to the mill from the highway will not pass as appurtenant.[7] The incidents which pass as appurtenances must be open and visible.[8] But it is not essential that at the time of the grant they should be in actual use in connection with the thing granted.[9] Nor are they limited to those absolutely necessary to the enjoyment of the property conveyed;[10] it is sufficient, if full enjoyment of the property cannot be had without them.[11] Ordinarily, whatever easements and privileges legally appertain to property pass by the conveyance of the property itself, without any additional words.[12] But a distinction is made between easements which are apparent and continuous, as a drain or sewer which is used continuously without the intervention of man,[13] and those which are non-apparent and non-continuous, as a right of way which can only be used by the intervention of man, repeated at intervals when user is desired.[14] The former are held to pass on the severance of two tenements as appurtenant without the use of the word "appurtenances";[15] but the latter will pass only by words sufficient to create a new easement, and the word "appurtenances" is not sufficient.[16] The term "appurtenant" signifies something appertaining to another thing as principal, and which passes as incident

thereto;[17] and therefore land cannot be appurtenant to land, or a messuage to a messuage, strictly speaking.[18]

1 Pomfret *v.* Ricroft, 1 Wms. Saund. 323 *a*, note; Cocheco etc. Co. *v.* Whittier, 10 N. H. 305; Wise *v.* Wheeler, 6 Ired. 196; Murphy *v.* Campbell, 4 Pa. St. 484; Winchester *v.* Hees, 35 N. H. 33; Janes *v.* Jenkins, 34 Md. 1; 6 Am. Rep. 300.

2 Sparks *v.* Hess, 15 Cal. 196; Dunklee *v.* Wilton R. R. Co. 24 N. H. 489; Allen *v.* Scott, 21 Pick. 25; 32 Am. Dec. 238; Sheets *v.* Selden, 2 Wall. 187; Brigham *v.* Smith, 4 Gray, 297.

3 Isham *v.* Morgan, 9 Conn. 374; 23 Am. Dec. 361; and see Goodrich *v.* Jones, 2 Hill, 142.

4 Wilson *v.* Hunter, 14 Wis. 683; and see Wooley *v.* Groton, 2 Cush. 205; Hare *v.* Horton, 5 Barn. & Adol. 715; Davis *v.* Handy, 37 N. H. 65; Pickering *v.* Stapler, 5 Serg. & R. 110. A grant of "warren" may pass the soil: Earl Beauchamp *v.* Winn, Law R. 6 Eng. & Ir. App. 223; 6 Eng. Rep. 37. The phrase, "a warren of conies," will only pass the franchise: Earl Beauchamp *v.* Winn, Law R. 6 Eng. & Ir. App. 223; 6 Eng. Rep. 37.

5 Whitney *v.* Olney, 3 Mason, 280; Gilson *v.* Brockway, 8 N. H. 465; Forbush *v.* Lombard, 13 Met. 109.

6 Wetmore *v.* White, 2 Caines Cas. 87; Crosby *v.* Bradbury, 20 Me. 61; Thompson *v.* Banks, 43 N. H. 540; Strickler *v.* Todd, 10 Serg. & R. 63; 13 Am. Dec. 649; Simmons *v.* Cloonan, 81 N. Y. 557.

7 Leonard *v.* White, 7 Mass. 8; 5 Am. Dec. 19.

8 Simmons *v.* Cloonan, 81 N. Y. 557; and see Butterworth *v.* Crawford, 46 N. Y. 349; 7 Am. Rep. 352. An appurtenance which is conveyed by general terms in a grant must be something which necessarily attaches to the lands conveyed, as a matter of right; and such terms do not convey a right or easement which the grantor was not authorized to impose upon adjoining lands: Green *v.* Collins, 86 N. Y. 246.

9 Simmons *v.* Cloonan, 81 N. Y. 557.

10 Simmons *v.* Cloonan, 81 N. Y. 557. The term "appurtenances" does not include land beyond boundaries: Woodhull *v.* Rosenthal, 61 N. Y. 382.

11 Simmons *v.* Croonan, 81 N. Y. 557; and see Dunklee *v.* Wilton R. R. Co. 24 N. H. 489.

12 Riddle *v.* Littleton, 53 N. H. 503; and see United States *v.* Appleton, 1 Sum. 492; Jackson *v.* Hathaway, 15 Johns. 447; Plant *v.* James, 5 Barn. & Adol. 791; Green *v.* Collins, 4 Hun, 474; Booth *v.* Alcock, Law R. 8 Ch. App. 663; Leech *v.* Schrueder, Law R. 9 Ch. App. 463.

13 See tit. EASEMENTS.

14 Parsons *v.* Johnson, 68 N. Y. 66; 23 Am. Rep. 149; Poedon *v.* Boston, Law R. 1 Q. B. 156; Lampman *v.* Milks, 21 N. Y. 505.

15 Fetters *v.* Humphreys, 19 N. J. Eq. 471.

16 Fetters *v.* Humphreys, 19 N. J. Eq. 471; Russell *v.* Harford, Law R. 2 Eq. Cas. 507; Langley *v.* Hammond, Law R. 3 Ex. 161; Parsons *v.* Johnson, 68 N. Y. 66; 23 Am. Rep. 149; and see Plant *v.* James, 6 Nev. & M. 282; 4 Ad. & E. 749.

17 Harris *v.* Elliott, 10 Peters, 25, 54; Woodhull *v.* Rosenthal, 61 N. Y. 390. Compare Coburn *v.* Ames, 52 Cal. 396; Matter of New York Cent. R. R. Co. 49 Barb. 505.

18 Hall *v.* Benner, 1 Pen. & W. 42; 21 Am. Dec. 394; Van O'Linda *v.* Lothrop, 21 Pick. 292; 32 Am. Dec. 261; Leonard *v.* White, 7 Mass. 8; 5 Am. Dec. 19; and see Annidown *v.* Granite Bank, 8 Allen, 291.

§ 307. What the term "messuage" includes.—The word "messuage," when used as a term descriptive of the thing intended to be conveyed, will generally include the dwelling-house and all buildings attached or adjoining to it;[1] also the curtilage, garden, orchard, etc., and the land upon which the dwelling-house is built.[2] The grant of a "dwelling-house" or "cottage" will pass the land upon which it stands and also the curtilage.[3] So by the grant of a "wharf and dock," the flats in front of them may pass, as well as the dock and the land under the wharf.[4] The conveyance of a "farm" will pass a messuage, arable land, meadow, pasture, wood, etc., thereto belonging.[5] The word "land," in its legal signification, includes any ground, soil, or earth whatever, as meadows, pastures, woods, moors, waters, marshes, furzes, heaths, and also all houses and other buildings erected thereon, and they will pass with a grant of the land.[6] The words "lands, tenements, and hereditaments" will pass every species of real property.[7]

1 2 Greenl. Cruise, 642.

2 2 Greenl. Cruise, 642; Shep. Touch. 94; Smith *v.* Martin, 2 Wms. Saund. 401; and see Suines *v.* Wilson, 4 Blackf. 334.

3 Hilton *v.* Gilman, 15 Me. 263; Emerton *v.* Selby, 2 Raym. Ld. 1015. Compare Saltonstall *v.* Brown, 3 Met. 423; Wise *v.* Wheeler, 6 Ired. 196.

4 Doane *v.* Broad Street Assoc. 6 Mass. 332.

5 Shep. Touch. 93. Compare Bradshaw *v.* Ellis, 2 Dev. & B. 20; Burke *v.* Chamberlain, 22 Md. 308.

6 2 Greenl. Cruise, 643; Coombs *v.* Jordan, 3 Bland Ch. 284; 22 Am. Dec. 236; First Parish etc. *v.* Jones, 8 Cush. 189; and see Tripp *v.* Hasceig, 20 Mich. 254; 4 Am. Rep. 388.

7 2 Greenl. Cruise, 644; and see chap. I., *ante*.

§ 308. Title deeds.—English conveyances usually contain a clause granting all deeds and other muniments of title relating to the premises conveyed, where the estate granted is a fee.[1] But such a clause is not absolutely necessary, because, in general, deeds follow the land, and a purchaser in fee, without warranty, is entitled to them, though not particularly granted.[2] And in this country such a clause is uncalled for, since the universal

practice of registration furnishes everything that is requisite in the history of the title.[3]

1 2 Greenl. Cruise, 648; and see Lord v. Wardle, 3 Bing. N. R. 680.

2 2 Greenl. Cruise, 648; and see Harrington v. Price, 3 Barn. & Adol. 170; Papillon v. Voice, 2 P. Wms. 471; Redwine v. Brown, 10 Ga. 311; Goode v. Burton, 11 Jur. 851; Mills v. Mead, 7 Hun, 36.

3 See Woodman v. Coolbroth, 7 Me. 181; Kelsey v. Hanmer, 18 Conn. 311; Scanlan v. Wright, 13 Pick. 523; 25 Am. Dec. 344. Where an executor is authorized to sell the real estate, and an inspection of the title deeds is necessary to a proper discharge of his duties, he is entitled to their control and possession: Mills v. Mead, 7 Hun, 38; and see Cobbett v. Clutton, 2 Car. & P. 471.

§ 309. Covenants in deeds.—Covenants in deeds are those clauses of agreement therein whereby either party stipulates for the truth of certain facts, or binds himself to perform, or forbear doing, something to the other.[1] They are either express, that is, created by the express words of the parties to the deed;[2] or are implied, that is, created by implication of law.[3] Any form of words sufficiently showing the intention of the parties will make an express covenant;[4] and it is not even essential that the word "covenant" itself should be used for this purpose.[5] And a covenant expressed by way of recital may be as obligatory as if expressed in the formal part of the deed.[6] Among the words and forms of expression, from the use of which covenants may be implied, are the following: "give,"[7] "grant,"[8] "demise,"[9] "lease,"[10] "yielding and paying,"[11] "grant, bargain, and sell,"[12] and the like.[13] And although a deed contains express covenants, other covenants may still be implied at common law;[14] but an express covenant will qualify the generality of an implied covenant, and restrain it so that it shall not be held broader than the express covenant.[15] A covenant, being part of a deed, is subject to the same rules of construction as the latter, and should be so expounded as to give effect to the actual intent of the parties;[16] so that construction is to be preferred which renders the whole covenant operative;[17] and it is to be most strongly construed against the cov-

enantor, and most favorably to the covenantee.[18] Generally, the interpretation should be in accordance with the reasonable sense of the words employed.[19] It is said that express covenants are to be constructed more strictly than implied ones, since the former may be entered into without consideration, under hand and seal.[20]

1 2 Blackst. Com. 304; Bac. Abr. tit. Cov. See also Randel v. Chesepeake etc. Canal Co. 1 Har. (Del.) 233; De Bolle v. Penna. Ins. Co. 4 Whart. 68; 33 Am. Dec. 38; Greenleaf v. Allen, 127 Mass. 248.

2 1 Bouv. Dict. 403.

3 Parker v. Smith, 17 Mass. 413; Emerson v. Wiley, 10 Pick. 310; Frey v. Johnson, 22 How. Pr. 323; Taylor v. Hepper, 62 N. Y. 649; Williams v. Burrell, 1 Com. B. 429.

4 Jackson v. Stewart, 20 Johns. 85; Marshall v. Craig, 1 Bibb, 379; 4 Am. Dec. 647; Lovering v. Lovering, 13 N. H. 513; Rigby v. Great Western Railw. 14 Mees. & W. 811; Sampson v. Esterby, 9 Barn. & C. 505.

5 Randel v. Chesapeake etc. Canal Co. 1 Har. (Del.) 151; Bull v. Follett, 5 Cowen, 170; Kendall v. Talbot, 2 Bibb, 614.

6 De Forest v. Byrne, 1 Hilt. 43; Horry v. Frost, 10 Rich. Eq. 109. Compare Anon. v. May, 2 Hawy. 127.

7 Kent v. Welch, 7 Johns. 258; Vanderkarr v. Vanderkarr, 11 Johns. 122. Compare Dow v. Lewis, 4 Gray, 468; Allen v. Sayward, 5 Me. 227.

8 Baber v. Harris, 9 Ad. & E. 532; Grannis v. Clark, 8 Cowen, 36.

9 Sumner v. Williams, 8 Mass. 201; Williams v. Burrell, 1 Com. B. 402, 429; Bruce v. Fulton Nat. Bank, 79 N. Y. 162.

10 Bandy v. Cartwright, 2 El. & B. 331; 20 Eng. L. & Eq. 88; Maule v. Ashmead, 20 Pa. St. 482.

11 Kimpton v. Walker, 9 Vt. 191.

12 Bush v. Cooper, 26 Miss. 599; and see Dickson v. Desire, 23 Mo. 151; Gratz v. Ewalt, 2 Binn. 95. But compare Frost v. Raymond, 2 Caines, 188; Huntley v. Waddell, 12 Ired. 32.

13 See Frost v. Raymond, 2 Caines, 188; Crouch v. Fowle, 9 N. H. 222; Adams v. Gibney, 6 Bing. 656; Mack v. Patchin, 5 N. Y. 167. By statute, in New York, no covenant shall be implied in any conveyance of real estate: see Kinney v. Watts, 14 Wend. 33; but covenants are still implied in leases for years: Lynch v. Onondaga Salt Co. 64 Barb. 558; Mayor etc. v. Mabie, 13 N. Y. 158.

14 Roebuck v. Dupuy, 2 Ala. 535; Funk v. Voneida, 11 Serg. & R. 109; Morris v. Harris, 9 Gill, 27; Sumner v. Williams, 8 Mass. 201. But compare Burr v. Stenton, 43 N. Y. 462; Vanderkarr v. Vanderkarr, 11 Johns. 122; Merritt v. Closson, 36 Vt. 172. But a covenant cannot be implied in the absence of language tending to a conclusion that the covenant sought to be set up was intended: Hudson Canal Co. v. Pa. Coal Co. 8 Wall. 276; Booth v. Cleveland Rolling Mill Co. 74 N. Y. 15.

15 Crouch v. Fowle, 9 N. H. 219; 32 Am. Dec. 350; Lynch v. Onondaga Salt Co. 64 Barb. 558; Line v. Stephenson, 5 Bing. N. C. 183.

16 Watchman v. Crook, 5 Gill & J. 239; Wadlington v. Hill, 18 Miss. 560; Marvin v. Stone, 2 Cowen, 781; Schoenberger v. Hoy, 40 Pa. St. 132; Ludlow v. M'Crea, 1 Wend. 228.

17 Randel v. Chesapeake etc. Canal Co. 1 Har. (Del.) 154.

18 Hookes v. Swain, Lev. 102; Sid. 151; Randel v. Chesapeake etc. Canal Co. 1 Har. (Del.) 154; Gifford v. First Presby. Soc. 56 Barb. 114; Warde v. Warde, 16 Beav. 103.

19 Pavey v. Burch, 3 Mo. 447; Killian v. Harshan, 7 Ired. 497; and see Rogers v. Danforth, 9 N. J. Eq. 289; Toms v. Wilson, 4 Best & S. Smith, 442.

20 Shubrick v. Salmond, 3 Burr. 1639.

§ 310. Covenant of seizin.—Covenants for title inserted in modern deeds conveying lands take the place of the ancient feudal warranty;[1] and their purpose is to secure to the grantee the benefit of the title which the grantor professes to convey.[2] What are usually termed "full covenants" in the United States are those for seizin, for right to convey, against encumbrances, for quiet enjoyment, for further assurance, and of warranty.[3] The first, or covenant for seizin, is that whereby the grantor covenants with the grantee that he, the grantor, has the very estate, both in quantity and quality, which he professes to convey.[4] If, therefore, the grantor undertakes to convey land by deed, and enters into a covenant of seizin therein, and he has no possession of the land, either by himself or by another, the covenant is at once broken.[5] And, according to the English and many of the American decisions, a covenant of "seizin," or "lawful seizin," is a covenant that the grantor is seized of an *indefeasible* estate;[6] but the courts of some of the States hold that this covenant is satisfied if the grantor has an *actual* seizin, claiming a fee, although his title was acquired tortiously, and is defeasible.[7] And the covenant of seizin extends only to a title existing in a third person, and which might defeat the estate granted;[8] and therefore a person will not be permitted to accept a deed with covenants of seizin, and then allege that his covenant is broken, for that, at the time he accepted the deed, he himself was seized of the premises.[9]

1 See 2 Greenl. Cruise, 761; Middlemore v. Goodale, Cro. Car. 503.

2 2 Greenl. Cruise, 761; 1 Bouv. Dict. 403; Fitzhugh v. Croghan, 2 Marsh. J. J. 429; 19 Am. Dec. 139.

3 4 Kent Com. 471; Rawle Cov. for Tit. 27; Kingdom v. Nottle, 1 Maule & S. 355.

4 Howell v. Richards, 11 East, 641; Greenby v. Wilcocks, 2 Johns. 1; Pecare v. Chouteau, 15 Mo. 527. Covenant to stand seized has not been abolished by the Revised Statutes in New York: Eysaman v. Eysaman, 24 Hun, 430.

5 Colt v. McReynolds, 2 Rob. (N. Y.) 655; Fitzhugh v. Croghan, 2 Marsh. J. J. 429; 19 Am. Dec. 139; Slater v. Rawson, 1 Met. 450; Salmon v. Vallejo, 41 Cal. 481; Allen v. Little, 36 Me. 170; Dickinson v. Hoomes, 8 Gratt. 397; Dale v. Shively, 8 Kan. 276.

6 Young v. Raincock, 7 Com. B. 310; Lockwood v. Sturdevant, 6 Conn. 385; Mills v. Catlin, 22 Vt. 106; Parker v. Brown, 15 N. H. 186.

7 Raymond v. Raymond, 10 Cush. 134; Watts v. Parker, 27 Ill. 229; Wilson v. Widenham, 51 Me. 567; Follett v. Grant, 5 Allen, 175.

8 Fitch v. Baldwin, 17 Johns. 161; Furness v. Williams, 11 Ill. 229; Colt v. McReynolds, 2 Rob. (N. Y.) 655.

9 Fitch v. Baldwin, 17 Johns. 161.

§ 311. Breach of covenant of seizin. — As to what constitutes a breach of the covenant of seizin, it has been held sufficient if there be an outstanding estate for life;[1] or if there be an adverse possession of a part by a stranger;[2] or a concurrent seizin of another as tenant in common;[3] or if no such land exists as that purported to be conveyed;[4] or even if there be a material deficiency in the amount of land;[5] or if the grantor has only an estate tail.[6] And generally, if the grantor at the time of the conveyance do not own such things affixed to the freehold as would pass to the grantee by a conveyance of the land itself, as fences,[7] or a building,[8] the covenant of seizin is broken.[9] And where the grantor conveyed premises, a portion of which he had previously conveyed and given possession of to another, the covenant of seizin, so far as it related to the portion previously conveyed, was held to be broken at the date of the deed.[10] But this covenant is not broken by the existence upon the land of easements or encumbrances not in any way affecting the technical seizin of the purchaser;[11] thus, it is not such a breach that a part of the land conveyed was occupied by a railroad,[12] or a public highway,[13] or that the land was encumbered by an outstanding mortgage,[14] or a judgment,[15] or a right of dower.[16] But it is held that a judgment for taxes, sale, and tax-deed constitute a breach of this covenant.[17] It is generally held by the American

decisions that there is a breach of the covenant for seizin, if at all, as soon as the deed is executed;[18] and that the right of action for damages arising from the breach cannot pass to a subsequent assignee.[19] But according to other decisions, if there is an *actual* seizin, the breach is not final and total in the first instance, but is postponed until the grantee, or those claiming under him, are disturbed in their seizin, either actually or constructively;[20] and that the claim for damages will pass by a conveyance to a subsequent grantee.[21]

1 Wilder *v.* Ireland, 8 Jones (N. C.) 90; Mills *v.* Catlin, 22 Vt. 106. Compare Van Wagner *v.* Van Nostrand, 19 Iowa, 422. As to the burden of proof of a breach of this covenant: see Woolley *v.* Newcomb, 87 N. Y. 605.

2 Sedgwick *v.* Hollenback, 7 Johns. 376.

3 Downer *v.* Smith, 38 Vt. 464; Wheeler *v.* Hatch, 13 Me. 389.

4 Bacon *v.* Lincoln, 4 Cush. 212; Basford *v.* Pearson, 9 Allen, 389. Compare Morrison *v.* McArthur, 43 Me. 567.

5 Pringle *v.* Witten, 1 Bay, 256. Compare Phipps *v.* Tarpley, 24 Miss. 597; Kincaid *v.* Brittain, 5 Sneed, 123.

6 Comstock *v.* Comstock, 23 Conn. 352.

7 Mott *v.* Palmer, 1 N. Y. 572.

8 West *v.* Stewart, 7 Pa. St. 122.

9 See West *v.* Stewart, 7 Pa. St. 122; Burke *v.* Nichols, 1 Abb. Ct. App. 260; Tift *v.* Horton, 53 N. Y. 381; Ritchmyer *v.* Morse, 3 Keyes, 343; 37 How. Pr. 388; Loughran *v.* Ross, 45 N. Y. 792; 6 Am. Rep. 173.

10 Lamb *v.* Danforth, 59 Me. 322; 8 Am. Rep. 426; and compare Hall *v.* Gale, 20 Wis. 293; Clark *v.* Conrae, 38 Vt. 469; Traster *v.* Snelson, 29 Ind. 96.

11 See Reasoner *v.* Edmundson, 5 Ind. 394; Vaughn, 16 Ind. 340; Stockwell *v.* Coullard, 129 Mass. 231; Lewis *v.* Jones, 1 Pa. St. 336.

12 Kellogg *v.* Malin, 50 Mo. 496; 11 Am. Rep. 426.

13 Whitbeck *v.* Cooke, 15 Johns. 483; 8 Am. Dec. 272; Vaughn *v.* Stuzaker, 16 Ind. 340.

14 Sedgwick *v.* Hollenback, 7 Johns. 380.

15 Sedgwick *v.* Hollenback, 7 Johns. 380.

16 Fitzhugh *v.* Croghan, 2 Marsh. J. J. 429; 19 Am. Dec. 139; Tuite *v.* Miller, 10 Ohio, 383; Lewis *v.* Lewis, 5 Rich. 12.

17 Vorhis *v.* Forsythe, 4 Biss. 409.

18 Salmon *v.* Vallejo, 41 Cal. 481; Wilson *v.* Cochran, 46 Pa. St. 229; Fowler *v.* Poling, 2 Barb. 300; Pollard *v.* Dwight, 4 Cranch, 430; Lot *v.* Thomas, 1 Pen. (N. J.) 407; 2 Am. Dec. 354; Richard *v.* Bent, 59 Ill. 38; 14 Am. Rep. 1; § 310, *ante*.

19 Redwine *v.* Brown, 10 Ga. 314; Marston *v.* Hobbs, 2 Mass. 439; Greenby *v.* Wilcocks, 2 Johns. 1; 3 Am. Dec. 379; Wead *v.* Larkin, 54 Ill. 489; 5 Am. Rep. 149. Compare Slater *v.* Rawson, 1 Met. 450; 6 Met. 439.

20 Devore *v.* Sunderland, 17 Ohio, 60; Great Western Stock Co. *v.* Sass, 24 Ohio St. 542.

21 Devore v. Sunderland, 17 Ohio, 60; and see Richard v. Bent, 59 Ill. 38; 14 Am. Rep. 1; Schofield v. Iowa Homestead Co. 32 Iowa, 317; 7 Am. Rep. 197; Beddoe v. Wadsworth, 21 Wend. 120; Coleman v Lyman, 42 Ind. 289.

§ 312. Covenant for right to convey.—Covenant for right to convey, and covenant for seizin, are sometimes said to be synonymous, and that they amount to the same thing.[1] The same fact, the seizin of the grantor, which will support the latter will also support the other covenant.[2] And covenant for right to convey, like covenant for seizin, is broken at the time of conveyance, if at all, and therefore cannot be taken advantage of by an heir or an assignee.[3] But with respect to this covenant for right to convey, it should be observed that although if a man be seized in fee he has power to convey, yet the converse will not hold, since he may have the power to convey, though not seized in fee.[4]

1 Marston v. Hobbs, 2 Mass. 437; Brandt v. Foster, 5 Iowa, 294; Rickert v. Snyder, 9 Wend. 421; Raymond v. Raymond, 10 Cush. 140. But see Richardson v. Dorr, 5 Vt. 21.

2 Marston v. Hobbs, 2 Mass. 437.

3 Chapman v. Holmes, 5 Halst. 20; Hamilton v. Wilson, 4 Johns. 72; Swasey v. Brooks, 30 Vt. 692.

4 2 Greenl. Cruise, 761; Gainsford v. Griffith, 16 Vin. Abr. 206; Devore v. Sunderland, 17 Ohio, 52.

§ 313. Covenants against encumbrances.—Covenants against encumbrances are also *in præsenti*, and are broken, if at all, as soon as made, and are thereby turned into mere rights of action not assignable at law.[1] In general terms, "every right to and interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance, is to be deemed in law an encumbrance."[2] Thus, a right to an easement or servitude of any kind in the land, as an existing right in a third person to cut and maintain a drain,[3] or other artificial water-course,[4] or to cut and remove standing trees,[5] is an encumbrance, and a breach of the covenant against encumbrances.[6] So of a right to pass over the land and take water from a spring;[7] or to

erect dams at different places on a stream.[8] And a grant to a railroad company of a right of way is an easement, the existence of which is a breach of this covenant in a subsequent deed of the same land by the same grantor to a third party.[9] So the existence of a public road or highway over the land is in most of the States held to be a breach of this covenant.[10] An outstanding mortgage,[11] unless the premises are declared to be subject thereto,[12] a judgment,[13] an attachment,[14] a claim of dower,[15] taxes,[16] and a paramount title,[17] are all held to be encumbrances within the meaning of a covenant against encumbrances.[18] Nor are the rights of the parties claiming under the covenant affected by the fact that the covenantee knew of the existence of the encumbrance at the time of the conveyance.[19] It is held to be a breach of the covenant where premises are sold subject to a covenant that no ardent spirits shall be sold thereon,[20] or that a division fence shall be maintained,[21] or subject to a restriction against building, except in a specified way.[22] It has also been held that the covenant is broken by the existence of a prior outstanding lease.[23] But the right which a mill owner has to go upon the land and clear the channel of a stream is not an encumbrance.[24] And no tax or assessment will be deemed an encumbrance upon land until the amount of such tax is ascertained or determined.[25] And an outstanding mortgage, which the covenantee is bound to pay, is not on encumbrance.[26]

1 Clark *v.* Swift, 3 Met. 390; Funk *v.* Voneida, 11 Serg. & R. 110; 14 Am. Dec. 617; Richard *v.* Bent, 59 Ill. 38; 14 Am. Rep. 1; Logan *v.* Moulder, 1 Ark. 313; 33 Am. Dec. 338; and see § 304, *ante*. But compare Foote *v.* Burnet, 10 Ohio, 333.

2 Prescott *v.* Trueman, 4 Mass. 630; 3 Am. Dec. 245; and see Bronson *v.* Coffin, 108 Mass. 175; Mitchell *v.* Warner, 5 Conn. 527; Cary *v.* Daniels, 8 Met. 482.

3 Smith *v.* Sprague, 40 Vt. 43.

4 Prescott *v.* White, 21 Pick. 341.

5 Cathcart *v.* Bowman, 5 Pa. St. 319; Spurr *v.* Andrew, 6 Allen, 420.

6 See Kutz *v.* McCune, 22 Wis. 628; Brooks *v.* Curtis, 4 Lans. 283; 50 N. Y. 639; 10 Am. Rep. 545; McMullin *v.* Wooley, 2 Lans. 394; Giles *v.* Dugro, 1 Duer, 331; Lamb *v.* Danforth, 59 Me. 322; 8 Am. Rep. 426.

7 Harlow *v.* Thomas, 15 Pick. 68. Compare Russ *v.* Steele, 40 Vt. 310.

8 Ginn v. Hancock, 31 Me. 42. Compare Wetherbee v. Bennett, 2 Allen, 428.

9 Burk v. Hill, 48 Ind. 52; 17 Am. Rep. 731; Kellogg v. Malin, 50 Mo. 496; 11 Am. Rep. 426; Beach v. Miller, 51 Ill. 206; 2 Am. Rep. 290.

10 Pritchard v. Atkinson, 3 N. H. 335; Kellogg v. Ingersoll, 2 Mass. 101; Parish v. Whitney, 3 Gray, 516; Haynes v. Young, 36 Me. 557; Burk v. Hill, 48 Ind. 52; 17 Am. Rep. 731. It is otherwise, however, in Pennsylvania: Wilson v. Cochran, 46 Pa. St. 229; and see Whitbeck v. Cook, 15 Johns. 483; 8 Am. Dec. 272. In Georgia, if the highway is known to the purchaser to exist at the time of the purchase, the covenant is not broken: Desvergers v. Willis, 56 Ga. 515; 21 Am. Rep. 289.

11 Freeman v. Foster, 55 Me. 508; Brooks v. Moody, 25 Ark. 452; Prescott v. Trueman, 4 Mass. 630.

12 Freeman v. Foster, 55 Me. 508.

13 Jenkins v. Hopkins, 8 Pick. 346; Holman v. Creagmiles, 14 Ind. 177.

14 Kelsey v. Renor, 43 Conn. 129; 21 Am. Rep. 638.

15 Porter v. Noyes, 2 Me. 22; 11 Am. Dec. 30; Runnels v. Webber, 59 Me. 488; Bigelow v. Hubbard, 97 Mass. 195; Heimburg v. Ismay, 3 Jones & S. 35; McAlpin v. Woodruff, 11 Ohio St. 120. But see Powell v. Monson etc. Co. 3 Mason, 355; Bostwick v. Williams, 36 Ill. 65.

16 Mitchell v. Pillsbury, 5 Wis. 407; Peters v. Myers, 22 Wis. 602; Almy v. Hunt, 48 Ill. 45; Rundell v. Lakey, 40 N. Y. 514; Ingalls v. Cooke, 21 Iowa, 560; Long v. Moler, 5 Ohio St. 271.

17 Prescott v. Trueman, 4 Mass. 630; 3 Am. Dec. 246; Cornell v. Jackson, 3 Cush. 309.

18 See Cary v. Daniels, 8 Met. 482; Bean v. Mayo, 5 Me. 94; Carter v. Denman, 23 N. J. L. 273; Hutchins v. Moody, 34 Vt. 433; McMullin v. Wooley, 2 Lans. 394.

19 Snyder v. Lane, 10 Ind. 424; Beach v. Miller, 51 Ill. 206; 2 Am. Rep. 290; Funk v. Voneida, 11 Serg. & R. 110; 14 Am. Dec. 617; Hovey v. Newton, 7 Pick. 29. But compare Desvergers v. Willis, 56 Ga. 515; 2 Am. Rep. 289.

20 Hatcher v. Andrews, 5 Bush. 561.

21 Burbank v. Pillsbury, 48 N. H. 475; and see Anonymous, 2 Abb. N. C. 56.

22 Roberts v. Levy, 3 Abb. Pr. N. S. 311. Compare Floyd v. Clark, 7 Abb. N. C. 136; Walter v. Walter, 3 Abb. N. C. 12.

23 Batchelder v. Sturgis, 3 Cush. 201; Porter v. Bradley, 7 R. I. 538. Compare Gale v. Edwards, 52 Me. 360; Pease v. Christ, 31 N. Y. 141; Cross v. Noble, 67 Pa. St. 77; James v. Lichfield, Law R. 9 Eq. 51.

24 Prescott v. Williams, 5 Met. 429.

25 Dowdney v. Mayor etc. 54 N. Y. 186; and see Barlow v. St. Nicholas Bank, 63 N. Y. 399; Pierce v. Brew, 43 Vt. 292.

26 Watts v. Wellman, 2 N. H. 458.

§ 314. Covenant for quiet enjoyment.—Covenant for quiet enjoyment is that whereby the grantor covenants that the grantee shall hold and enjoy the premises granted, without disturbance of the grantor or others.[1] This covenant extends to the possession merely, and not

to the title of the land;[2] and in order to establish a breach of the covenant, a lawful eviction in some form, either actual or constructive, must be shown.[3] According to the later decisions, the covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title, whether that title be established by judgment or not.[4] If the land conveyed is in the possession of a stranger under paramount title who keeps out the grantee, the covenant is broken.[5] But the grantee is bound to act in good faith towards his grantor, and make the most of whatever title he has acquired;[6] and if he yields without a contest or resistance, the burden rests upon him to show that the title was paramount, and that he yielded the possession to the pressure of that title.[7] A disturbance of the title and possession of the land, by reason of a suit in equity, is a breach of the covenant for quiet enjoyment against disturbances generally;[8] though it is otherwise if such disturbance extends only to a particular mode of enjoyment of the land, and not to the title or possession.[9] The covenant will not be held to extend to wrongful and unlawful evictions by third persons;[10] nor to evictions under rights acquired subsequently to the conveyance.[11] But an entry by the grantor himself, tortiously and without title, is a breach of the covenant.[12] And a covenant against the acts of a particular person named embraces tortious acts.[13] A covenant against disturbances, "by any persons whomsoever," does not, however, extend to the acts of a State,[14] or of the Federal Government.[15] In American conveyances the covenant of warranty frequently takes the place of that for quiet enjoyment;[16] but in England the latter is now called the "sweeping covenant," having practically superseded the feudal warranty as a guaranty of title.[17]

1 See Howell *v.* Richards, 11 East, 641; Fowler *v.* Poling, 6 Barb. 170; Connor *v.* Bernheimer, 6 Daly, 295; Rea *v.* Minkler, 5 Lans. 199; Norman *v.* Foster, 1 Mod. 101.

2 Whitbeck *v.* Cook, 15 Johns. 483; 8 Am. Dec. 272; Fowler *v.* Poling, 6 Barb. 170.

3 Rea v. Minkler, 5 Lans. 199; Russ v. Steele, 40 Vt. 315; Moore v. Frankenfield, 25 Minn. 540; Whitbeck v. Cook, 15 Johns. 483; 8 Am. Dec. 272; Greenvault v. Davis, 4 Hill, 645; Murphy v. Price, 48 Mo. 250; and see Ross v. Dysart, 33 Pa. St. 452; Mayor etc. v. Whitt, 15 Mees. & W. 577.

4 Clark v. Lineberger, 44 Ind. 223; McGary v. Hastings, 39 Cal. 360; 2 Am. Rep. 456; Stewart v. Drake, 4 Halst. 141; Cowdrey v. Coit, 44 N. Y. 382; 4 Am. Rep. 690; Smith v. Shepard, 15 Pick. 147; Home Life Ins. Co. v. Sherman, 46 N. Y. 370; and see Upton v. Townsend, 17 Com. B. 30; Adams v. Conover, 22 Hun, 424.

5 Shattuck v. Lamb, 65 N. Y. 499; 22 Am. Rep. 656; and see Playter v. Cunningham, 21 Cal. 229; Witty v. Hightower, 12 Smedes & M. 478; Noonan v. Lee, 2 Black, 507.

6 Moore v. Vail, 17 Ill. 190.

7 Moore v. Vail, 17 Ill. 190; Thomas v. Stickle, 32 Iowa, 76; Peck v. Hensley, 20 Tex. 678; Stone v. Hooker, 9 Cowen, 157.

8 Martin v. Martin, 1 Dev. 413; Calthorp v. Heyton, 2 Mod. 54; Rawle Cov. for Tit. (4th ed.) 143.

9 Dennett v. Atherton, Law R. 7 Q. B. 326.

10 2 Greenl. Cruise, 764; Rantin v. Robertson, 2 Strob. 366; Ellis v. Welch, 6 Mass. 250; Jones v. Worley, 21 La. An. 404; Dudley v. Folliott, 2 Term Rep. 584.

11 Ellis v. Welch, 6 Mass. 250; Frost v. Ernst, 4 Whart. 85.

12 Sedgwick v. Hollenback, 7 Johns. 376. But an entry by the lessor upon the demised premises merely to make repairs is not a breach of the covenant: Doupe v. Genin, 37 How. Pr. 5; 1 Sweeny, 25; and see Bostwick v. Williams, 36 Ill. 69; Mayor etc. v. Mabie, 13 N. Y. 156.

13 Foster v. Mapes, Cro. Eliz. 212; Nash v. Palmer, 5 Maule & S. 374; Pence v. Duval, 9 Mon. B. 49.

14 Frost v. Ernst, 4 Whart. 86; Ellis v. Welch, 6 Mass. 246.

15 Osborn v. Nicholson, 13 Wall. 655. Compare Walker v. Gatlin, 12 Fla. 9; Whitworth v. Carter, 43 Miss. 61; Porter v. Ralston, 6 Bush, 665; Fitzpatrick v. Hearne, 44 Ala. 171.

16 See Sisson v. Seabury, 1 Sum. 263; Kelley v. Dutch Church, 2 Hill, 105; Rea v. Minkler, 5 Lans. 199.

17 See Rawle Cov. for Tit. (4th ed.) 125.

§ 315. Covenant for further assurance.—Covenant for further assurance is one by which the grantor binds himself to make all such further assurances of the lands as the grantee or his counsel shall lawfully and reasonably require.[1] This covenant is of extensive use in English conveyances, but is rarely inserted in American deeds.[2] In the execution of the covenant, the grantor is not required to do *unnecessary* acts;[3] nor such as are impracticable.[4] But it includes the levying of a fine,[5] and the removal of a judgment or other encumbrance.[6] A covenant to the effect that if the grantors "obtain the fee-simple" to property conveyed "from the government of

the United States they will convey the same" to the grantee, his heirs, or assigns, "by deed of general warranty," [7] is a covenant for further assurance, and entitles such grantee, etc., when the contingency happens, to the conveyance of the legal title.[8] The covenant only takes effect in case the grantors acquire the title directly from the United States, and does not cover the acquisition of the title of the United States from any intermediate party.[9] The request for a further assurance must be made within a reasonable time.[10]

1 2 Greenl. Cruise, 767; Rosewell's Case, 5 Rep. 19 *b*; and see King *v.* Jones, 5 Taunt. 418; Miller *v.* Parsons, 9 Johns. 336; Fields *v.* Squires, Deady, 388; Armstrong *v.* Darby, 26 Mo. 517.

2 See Nelson *v.* Harwood, 3 Call, 394; Gwynn *v.* Thomas, 2 Gill & J. 420; Colby *v.* Osgood, 29 Barb. 339.

3 Warn *v.* Bickford, 7 Price, 550; 9 Price, 43.

4 Pet and Cally's Case, 1 Leon. 304.

5 King *v.* Jones, 5 Taunt. 418; Innes *v.* Jackson, 16 Ves. 366.

6 King *v.* Jones, 5 Taunt. 418; and see Colby *v.* Osgood, 29 Barb. 339.

7 See Davenport *v.* Lamb, 13 Wall. 418.

8 Lamb *v.* Burbank, 1 Sawy. 227. Compare Dussaume *v.* Burnett, 8 Iowa, 45; Davis *v.* Tarwater, 15 Ark. 286.

9 Davenport *v.* Lamb, 13 Wall. 418.

10 Nash *v.* Ashton, Jones T. 195; and see Heron *v.* Treyne, 2 Raym. Ld. 750; Miller *v.* Parsons, 9 Johns. 336.

§ 316. Covenant of warranty.—The covenant of warranty in a deed conveying land, or any interest therein, is an undertaking by the warrantor, that on the failure of the title which the deed purports to convey, either for the whole estate or for a part only, he will make compensation in money for the loss sustained by such failure of title.[1] This covenant goes to the title as well as the possession,[2] and therefore differs from the covenant for quiet enjoyment, which extends only to the possession.[3] So, as it respects the latter, the eviction is merely required to be of lawful right;[4] but in respect to the former, the eviction must not only be of lawful right, but by paramount title.[5] In legal effect, the two covenants are considered by many authorities to be the same.[6] Warranty is a personal covenant,[7] running with the land,[8]

and is the most effective covenant in American deeds.[9] In English deeds its place is supplied by the covenant for quiet enjoyment.[10] In order to sustain an action on a covenant of warranty, an eviction by judgment at law is not necessary.[11] The tenant may voluntarily yield to a dispossession, without losing his remedy on the covenant, provided the title to which he yielded be good and paramount to that of his warrantor.[12] But he does so at his own peril, and in a suit against his warrantor the burden of proof rests upon the plaintiff.[13] An eviction by legal process under a prior mortgage,[14] or under an unexpired term for years, is a sufficient breach of this covenant;[15] and a judgment in ejectment is a sufficient breach without actual eviction.[16] A general covenant of warranty is held to be broken by the existence of an outstanding right of way over the whole or a part of the premises conveyed.[17] But the opening of a highway over the land in virtue of the right of eminent domain is not an eviction.[18] And a general covenant of warranty is not broken by the existence of encumbrances known to the grantee at the time of sale, and which he agreed to pay off as a part of the consideration.[19] An illegal or tortious eviction is not a breach of a general covenant of warranty against the claims or acts of all persons;[20] but a particular or special covenant against the claims or acts of certain persons therein named is broken by such an eviction, if by the persons or under the claims specified.[21] Where one without title conveys with warranty, and afterwards acquires the title, it inures to the benefit of his grantee.[22] A conveyance with general warranty estops the grantor from setting up any after-acquired title.[23]

1 King *v.* Kerr, 5 Ohio, 154; 22 Am. Rep. 777. See Mitchel *v.* Warner, 5 Conn. 517.

2 Williams *v.* Wetherbee, 1 Aiken, 233; Patton *v.* Kennedy, 1 Marsh. A. K. 389; 10 Am. Dec. 744; Fowler *v.* Poling, 6 Barb. 170. See Blanchard *v.* Brooks, 12 Pick. 67; Rowe *v.* Heath, 23 Tex. 614; Brown *v.* Jackson, 3 Wheat. 449.

3 See § 314, *ante*.

4 See § 314, *ante*.

5 Rindskopf *v.* Farmers' etc. Co. 58 Barb. 36; King *v.* Kerr, 5 Ohio. 154; 22 Am. Rep. 777; Fowler *v.* Poling, 6 Barb. 165; Kellogg *v.* Platt, 3 N. J. L. 328; Kenney *v.* Norton, 10 Heisk. 334; and see Mills *v.* Rice, 3 Neb. 76; Bissell *v.* Kellogg, 60 Barb. 623.

6 See Rea *v.* Minkler, 5 Lans. 199; Bostwick *v.* Williams, 36 Ill. 70; Caldwell *v.* Kirkpatrick, 6 Ala. 60; Bricker *v.* Bricker, 11 Ohio St. 240.

7 Tabb *v.* Binford, 14 Leigh, 132; 26 Am. Dec. 317; Townsend *v.* Morris, 6 Cowen, 126; Cole *v.* Raymond, 9 Gray, 217.

8 King *v.* Kerr, 5 Ohio, 154; 22 Am. Rep. 777; Wilson *v.* Taylor, 9 Ohio St. 537; Suydam *v.* Jones, 10 Wend. 180; 25 Am. Dec. 552; Moore *v.* Merrill, 17 N. H. 81; Mead *v.* Larkin, 54 Ill. 439; 5 Am. Rep. 149; De Chaumont *v.* Forsythe, 2 Penn. 514; Rindskopf *v.* Farmers' etc. Co. 58 Barb. 36.

9 See Foote *v.* Burnet, 10 Ohio, 329, note; Dickinson *v.* Hoomes, 8 Gratt. 399; Leary *v.* Durham, 4 Ga. 601.

10 See § 314, *ante*.

11 Greenvault *v.* Davis, 4 Hill, 643; § 307, *ante*; Patton *v.* Kennedy, 1 Marsh. A. K. 389; 10 Am. Rep. 744. But compare Stewart *v.* Drake, 4 Halst. 139; Stipe *v.* Stipe, 2 Head. 169.

12 Hamilton *v.* Cutts, 4 Mass. 352; 3 Am. Dec. 222; and see Donnell *v.* Thompson, 10 Me. 170; 25 Am. Dec. 216; Peck *v.* Wensley, 20 Tex. 673; Brandt *v.* Foster, 5 Iowa, 297; Booker *v.* Bell, 3 Bibb, 173; 6 Am. Dec. 641.

13 Hamilton *v.* Cutts, 4 Mass. 352; 3 Am. Dec. 222; Smith *v.* Shepard, 15 Pick. 147; Cranco *v.* Collenbaugh, 47 Ind. 256. Recent decisions in many of the States sustain the doctrine that an eviction is complete when a constructive dispossession has taken place: see Kansas etc. R. R. *v.* Dunmeyer, 19 Kans. 539; Whitney *v.* Dinsman, 6 Cush. 124; Jones *v.* Warner, 81 Ill. 346; McGary *v.* Hastings, 39 Cal. 360; 2 Am. Rep. 456; § 307, *ante*. But this doctrine is not adopted in Mississippi; Barris *v.* Wilkinson, 31 Miss. 537; Dyer *v.* Britton, 53 Miss. 270; and compare Fitzhugh *v.* Croghan, 2 Marsh. J. J. 429; 19 Am. Dec. 139.

14 Tufts *v.* Adams, 8 Pick. 547. Compare Cowdrey *v.* Colt, 44 N. Y. 382; 4 Am. Rep. 690; Curtis *v.* Deering, 12 Me. 499.

15 Rickert *v.* Snyder, 9 Wend. 416.

16 Drury *v.* Shumway, 1 Chip. D. 110; 1 Am. Dec. 704; Cummins *v.* Kennedy, 3 Litt. 118; 14 Am. Dec. 45; Williams *v.* Wetherbee, 1 Aiken, 233. But see Ferriss *v.* Harshea, 1 Mart. & Y. 48; 17 Am. Dec. 782.

17 Russ *v.* Steele, 40 Vt. 310. Compare § 307, *ante*.

18 Peck *v.* Jones, 70 Pa. St. 83; and see Spader *v.* N. Y. El. R. R. Co. 3 Abb. N. C. 467. This covenant is not broken by any act of a mere stranger: Norton *v.* Jackson, 5 Cal. 263; Hale *v.* New Orleans, 13 La. An. 499.

19 Pitman *v.* Conner, 27 Ind. 337.

20 Patton *v.* Kennedy, 1 Marsh. A. K. 389; 10 Am. Dec. 744.

21 Patton *v.* Kennedy, 1 Marsh. A. K. 389; 10 Am. Dec. 744. Compare Comstock *v.* Smith, 13 Pick. 116; Kimball *v.* Temple, 25 Cal. 454; Davenport *v.* Lamb, 13 Wall. 418; Ballard *v.* Child, 45 Me. 152, § 307, *ante*.

22 Williams *v.* Gray, 3 Me. 207; 14 Am. Rep. 234; Kimball *v.* Schoff, 40 N. H. 190; Burton *v.* Reeds, 20 Ind. 87. Compare Russ *v.* Alpaugh, 118 Mass. 369.

23 Comstock *v.* Smith, 13 Pick. 116; 23 Am. Dec. 670; Crocker *v.*

Pierce, 31 Me. 177; Butler *v.* Seward, 10 Allen, 468. But compare Doane *v.* Willcutt, 5 Gray, 333; Miller *v.* Ewing, 6 Cush. 40. A grantor is not estopped from acquiring title to the premises conveyed by adverse possession, which will not accrue to the benefit of the grantee: Sherman *v.* Kane, 14 Jones & S. 310.

§ 317. Covenants running with the land.—A covenant is said to run with the land "when either the liability to perform it or the right to take advantage of it passes to the assignee of that land."[1] They are such as relate to or "touch and concern the land" in such a way that their benefit or burden is capable of running with it;[2] and if the thing to be done is merely *collateral* to the land, then the assignee is not charged.[3] In England all covenants for title are termed real covenants, and run with the land.[4] But the prevailing doctrine in this country is that covenants of seizin, of good right to convey, and against encumbrances, are covenants *in præsenti*, which, if broken at all, the breach occurs at the instant they are made;[5] these covenants do not therefore run with the land, and the right of action for a breach does not pass to the assignee of the covenantee.[6] But covenants for quiet enjoyment, for further assurance, and of warranty are prospective in their character,[7] running with the land,[8] and may be enforced not only by the covenantee and his representatives, but by heirs, devisees, and alienees, who claim under the seizin vested in him.[9] So there are other covenants which run with the land, as a covenant by a tenant to repair;[10] a covenant to maintain fences;[11] to pay rent;[12] to reside on the premises;[13] to cultivate the lands demised in a particular manner;[14] not to carry on a particular trade;[15] to allow the lessor free access to certain rooms excepted in the demise;[16] by a lessor for years, to pay the lessee for his improvements at the end of the term;[17] by a grantor, not to erect or suffer to be erected any structure or edifice upon a lot adjoining the premises conveyed;[18] or that neither he nor his heirs shall make any claim to the land conveyed;[19] and by a purchaser of lands, not to exercise or permit to be exer-

cised any offensive trade upon the premises.[20] So a covenant to effect insurance, and apply the proceeds to the repair of the property in case of loss by fire, runs with the land;[21] so of a covenant to save the husband from the wife's claim of dower;[22] or a covenant to pay assessments;[23] and a covenant in a conveyance of city lots, that any house which might be erected thereon should be set back a certain distance from the line of the street on which such lots fronted, was held to run with the land.[24] Incorporeal hereditaments, as well as those which are corporeal, may be the subject of covenants running with the land.[25] But covenants which are indefinite as to their subject-matter do not pass with the land.[26] A conveyance of the privilege of drawing water from a pond is not a conveyance of land, and a covenant connected with the privilege does not run with the land, and is not assignable.[27] A covenant by the owner of land not to permit a grist-mill to be erected upon his land does not run with the land;[28] so of a covenant not to hire persons of a certain description to work in a mill;[29] and so of a covenant by the vendor of marl land, that neither he nor his assigns will sell marl from adjoining land.[30] A covenant that the vendee, "his heirs and assigns, owner or owners of the land for the time being," would at any time, on six months' notice, resell to the vendor for a specified price, does not run with the land.[31] And it seems that such covenant would be void as suspending the power of alienation for an indefinite period.[32]

1 1 Smith Lead. Cas. *27; and see Brudnell v. Roberts, 2 Wils. 143; Norman v. Wells, 17 Wend. 136; Armstrong v. Wheeler, 9 Cowen, 88; Brown v. Staples, 28 Me. 497.

2 Spencer's Case, 5 Rep. 16; Dolph v. White, 14 N. Y. 301.

3 Webb v. Russell, 3 Term Rep. 402; Dolph v. White, 14 N. Y. 301. In order to create a covenant which will run with the land, there should be some privity of estate between the covenantor and covenantee: Morse v. Aldrich, 19 Pick. 449; Bronson v. Coffin, 108 Mass. 175; 11 Am. Rep. 335; Taylor v. Owen, 2 Blackf. 301; Brewer v. Marshall, 19 N. J. Eq. 537; Wheeler v. Schad, 7 Nev. 204; Cole v. Hughes, 54 N. Y. 444.

4 See 2 Greenl. Cruise, 756; Kingdom v. Nottle, 1 Maule & S. 355.

5 See Dusenbury v. Callaghan, 8 Hun, 541; Bethell v. Bethell, 54

Ind. 428; 23 Am. Rep. 650; Richard *v.* Bent, 59 Ill. 38; 14 Am. Rep. 1; §§ 311-313, *ante*.

6 Wilson *v.* Cochran, 46 Pa. St. 229; Salmon *v.* Vallejo, 41 Cal. 481. In Iowa the covenant for seizin runs with the land: Schofield *v.* Iowa Homestead Co. 32 Iowa, 317; 7 Am. Rep. 197; Knadler *v.* Sharp, 36 Iowa, 232; and see also Hall *v.* Plaine, 14 Ohio St. 417; Maguire *v.* Riggin, 44 Mo. 512; Coleman *v.* Lyman, 42 Ind. 289; Roberts *v.* Levy, 3 Abb. Pr. N. S. 311. The covenant against encumbrances runs with the land in Vermont: Cole *v.* Kimball, 52 Vt. 639.

7 Hurd *v.* Curtis, 19 Pick. 459; McGary *v.* Hastings, 39 Cal. 360; 2 Am. Rep. 456; Abbott *v.* Allen, 14 Johns. 248; Shelton *v.* Codman, 3 Cush. 318; Hunt *v.* Amidon, 4 Hill, 345.

8 Hunt *v.* Amidon, 4 Hill, 345; Logan *v.* Moulder, 1 Ark. 313; 33 Am. Dec. 338; Markland *v.* Crump, 1 Dev. & B. 94; Campbell *v.* Lewis, 3 Barn. & Ald. 392; and see § 316, *ante*.

9 Withy *v.* Mumford, 5 Cowen, 137; Rindskopf *v.* Farmers' etc. Trust Co. 58 Barb. 36; Claycomb *v.* Munger, 51 Ill. 373; White *v.* Whitney, 3 Met. 81; Burtners *v.* Keran, 24 Gratt. 42; Crisfield *v.* Storr, 36 Md. 129.

10 Dean *v.* Chapter of Windsor's Case, 5 Rep. 24; and see Harris *v.* Coulbourn, 3 Har. (Del.) 338.

11 Easter *v.* Little Miami R. R. Co. 14 Ohio St. 48; Bronson *v.* Coffin, 108 Mass. 175; 11 Am. Rep. 335; Duffy *v.* New York etc. R. R. Co. 2 Hilt. 496; Kellogg *v.* Robinson, 6 Vt. 276.

12 Van Rensselaer *v.* Smith, 27 Barb. 104; Van Rensselaer *v.* Dennison, 35 N. Y. 393; Hurst *v.* Rodney, 1 Wash. 375; Worthington *v.* Hewes, 19 Ohio St. 66.

13 Tatem *v.* Chaplin, 2 Black. H. 133.

14 Cockson *v.* Cock, Cro. Jac. 125.

15 Mayor etc. *v.* Pattison, 10 East, 136; Barron *v.* Richard, 3 Edw. Ch. 96; 8 Paige, 351; and compare St. Andrew's Church Appeal, 67 Pa. St. 512.

16 Bush *v.* Cales, 1 Show. 389; and see Brew *v.* Van Deman, 6 Heisk. 433; Norfleet *v.* Cromwell, 64 N. C. 1.

17 Stockett *v.* Howard, 34 Md. 121.

18 Trustees etc. *v.* Cowen, 4 Paige, 510.

19 Fairbanks *v.* Williamson, 7 Me. 96. Compare Trull *v.* Eastman, 3 Met. 121.

20 Barron *v.* Richard, 8 Paige, 351.

21 Thomas *v.* Von Kopff, 6 Gill & J. 372.

22 Gaines *v.* Poor, 3 Met. (Ky.) 503.

23 Kearney *v.* Post, 2 N. Y. 394.

24 Winfield *v.* Henning, 21 N. J. Eq. 188.

25 Sterling Hydraulic Co. *v.* Williams, 66 Ill. 393. But compare Mitchell *v.* Warner, 5 Conn. 497.

26 Flight *v.* Glossopp, 2 Bing. N. R. 125.

27 Wheelock *v.* Thayer, 16 Pick. 68; Mitchell *v.* Warner, 5 Conn. 497. A covenant by the lessor to furnish a supply of water binds an assignee: Jourdain *v.* Wilson, 4 Barn. & Adol. 266.

28 Harsha *v.* Reid, 45 N. Y. 415. Compare Brown *v.* McKee, 57 N. Y. 684.

29 Mayor etc. *v.* Pattison, 10 East, 136.

30 Brewer *v.* Marshall, 19 N. J. Eq. 537.

31 London etc. Railw. Co. v. Gomm, 30 Week. Rep. 620; 21 N. Y. Daily Reg. No. 150.

32 London etc. Railw. Co. v. Gomm, 30 Week. Rep. 620; 21 N. Y. Daily Reg. No. 150.

§ 318. Damages for breach of covenants.—The measure of damages for breach of the covenant of seizin, or of right to convey, is the consideration money and interest.[1] Upon an exchange of lands, the value of the tract conveyed, and not that of the tract received, is the true criterion of damages.[2] The covenant against encumbrances, being one of indemnity, the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the encumbrance;[3] in which case he is entitled to recover a just compensation for such injury,[4] or what money he reasonably ought to have paid to extinquish the encumbrance.[5] The reasonableness of the amount so paid is held to be a question for the jury;[6] but it must not be greater than the value of the land.[7] In the case of a breach of the covenants for quiet enjoyment or of warranty, the rule generally adopted is that the consideration money, with interest and costs, is the measure of damages.[8] But it has been held in some of the States, that damages for breach of these covenants should be ascertained by the value of the land at the time of eviction.[9] For breach of covenant for quiet enjoyment implied in a lease, the measure of damage is the value of the unexpired term at the time of eviction, over and above the rent reserved by the terms of the lease.[10]

1 Stubbs v. Page, 2 Me. 378; Leland v. Stone, 10 Mass. 459; Mitchell v. Hazen, 4 Conn. 495; Dale v. Shively, 8 Kan. 276; Nutting v. Herbert, 35 N. H. 120; Lacey v. Marnan, 37 Ind. 168; Phipps v. Tarpley, 31 Mo. 433; Cox v. Strode, 2 Bibb. 277; Blake v. Burnham, 29 Vt. 437; Park v. Check, 4 Cold. 20.

2 Cummins v. Kennedy, 3 Litt. 118; 14 Am. Dec. 45. Compare Farmers' Bank v. Glenn, 68 N. C. 35.

3 Richard v. Bent, 59 Ill. 38; 14 Am. Rep. 1.

4 See Bronson v. Coffin, 108 Mass. 175; 11 Am. Rep. 335.

5 Guthrie v. Russell, 46 Iowa, 269; 26 Am. Rep. 135; and see Schofield

v. Iowa Homestead Co. 32 Iowa, 317; 7 Am. Rep. 197; Barlow v. St. Nicholas Nat. Bank, 63 N. Y. 402; Read v. Pierce, 36 Me. 455; Eaton v. Lyman, 30 Wis. 41.

6 St. Louis v. Bissell, 46 Mo. 157.

7 Kelsey v. Remer, 43 Conn. 129; 21 Am. Rep. 638. In no event should the recovery exceed the consideration money for which the deed was given: Andrews v. Appel, 22 Hun, 429. Compare Porter v. Bradley, 7 R. I. 542; Mills v. Catlin, 22 Vt. 106.

8 Staats v. Ten Eyck, 3 Caines, 111; Mack v. Patchin, 42 N. Y. 167; 1 Am. Rep. 506; Cal. Civ. Code, § 3304; McGary v. Hastings, 39 Cal. 360; 2 Am. Rep. 456; Foster v. Thompson, 41 N. H. 379; Wade v. Comstock, 11 Ohio St. 82; Dickson v. Desire, 23 Mo. 166; Crispield v. Storr, 36 Md. 150. See Adams v. Conover, 22 Hun, 424. Costs incurred in defending the title will include necessary counsel fees: Dalton v. Bowker, 8 Nev. 190; Harding v. Larkin, 41 Ill. 413; Robertson v. Lemon, 2 Bush. 301; Taylor v. Holter, 1 Mon. T. 688; Smith v. Sprague, 40 Vt. 43. Otherwise, in Texas, unless such fees are agreed to be paid: Turner v. Miller, 42 Tex. 418. *Mesne* profits received by the grantee should be deducted from the interest: Combs v. Tarlton, 2 Dana, 467; Young v. Divine, 12 Week. Dig. 18; and see Foster v. Thompson, 41 N. H. 373; Burton v. Reeds, 20 Ind. 91; Winslow v. McCall, 32 Barb. 241.

9 Horsford v. Wright, Kirby, 3; 1 Am. Dec. 8; Smith v. Sprague, 40 Vt. 43; Hardy v. Nelson, 27 Me. 525; Wyman v. Ballard, 12 Mass. 304; Coleman v. Ballard, 13 La. An. 512; Smith v. Strong, 14 Pick. 128.

10 Mack v. Patchin, 42 N. Y. 167; 1 Am. Rep. 506; 29 How. Pr. 20; Williams v. Burrell, 1 Man. Gr. & S. 402; 5 Eng. C. L. 401; Lock v. Furze, 115 Eng. C. L. 94; Law R. 1 Com. P. 441; Rolph v. Crouch, Law R. 3 Ex. 44; and see Myers v. Burns, 35 N. Y. 272.

§ 319. Acknowledgment of deed.—It is a universal statutory requirement in the United States, that before a deed can be lawfully recorded, it shall be acknowledged or proved;[1] and it is a well-established rule, that the recording of a deed is of no legal effect, unless it has been acknowledged or proved, as prescribed by law.[2] Diversities exist, however, in the laws of the several States, in respect to the officers before whom the acknowledgment may be made, and also in respect to the effect and operation of the acknowledgment.[3] An acknowledgment before the grantee himself is void, and the deed will be good only as between the parties.[4] But an officer is not disqualified to take an acknowledgment by reason of his relationship to the parties.[5] An acknowledgment before a justice of the peace *de facto* was held sufficient.[6] But separate acknowledgments before two justices of the peace were held to be insufficient.[7] A consul of the United States at a foreign port is a "magis-

trate," having power to take the acknowledgment of deeds.[8] So a United States judge, empowered to take acknowledgments, may do so in any part of the Union, if the land lies in his own district.[9] But an acknowledgment taken in one county before a justice of the peace of another county, where the land lies, is held to be void.[10] The certificate of acknowledgment will be liberally construed,[11] and the place of acknowledgment need not fully appear from the certificate itself, provided it can be ascertained with sufficient certainty from an inspection of the whole instrument.[12] A date is not essential to the validity of an acknowledgment,[13] and if omitted, it is presumed to be that of the deed;[14] and if no place is specified, it is presumed to be within the officer's jurisdiction.[15] The official designation or title of the officer certifying must appear;[16] and the certificate must state that the subscribing witness examined by the officer knew the person who executed the deed, and a statement that he saw him sign it is not sufficient proof of his identity.[17] An acknowledgment by one only of several grantors has been deemed sufficient.[18] The act of a magistrate in taking the acknowledgment of a deed is a judicial act,[19] and the certificate of acknowledgment, in the absence of fraud, imposition, or duress, is conclusive as to the facts therein stated.[20] And it is conclusive even in cases of fraud, etc., as to subsequent purchasers for a valuable consideration without notice.[21] But between the immediate parties to a deed, parol evidence is admissible to show fraud or duress connected with the acknowledgment,[22] or to show that there was, in fact, no acknowledgment.[23] The acknowledgment of an ancient deed renders it admissible in evidence, though not signed or sealed.[24]

1 See Thomas *v.* Le Baron, 8 Met. 355; Caltin *v.* Washburn 3 Vt. 25; Stubbs *v.* Kohn, 64 Ala. 186; Carter *v.* Chandron, 21 Ala. 72; Anderson *v.* Dugas, 29 Ga. 440; Chamberlain *v.* Spargur, 22 Hun, 437; Clark *v.* Troy, 20 Cal. 219; Sterlien *v.* Daley, 37 Mo. 483; § 297, *ante.*

2 Work *v.* Harper, 24 Miss. 517; White *v.* Denman, 1 Ohio St. 110; Bishop *v.* Schneider, 46 Mo. 472; 2 Am. Rep. 533; Taylor *v.* Harrison, 47 Tex. 454; 26 Am. Rep. 304; and see Wright *v.* Lancaster, 48 Tex. 250.

3 Compare Lynch *v.* Livingston, 6 N. Y. 422; Story *v.* Smith, 3 McLean, 362; Shaw *v.* Poor, 6 Pick. 86; Webb *v.* Den, 17 How. 576.

4 Groesbeck *v.* Seeley, 13 Mich. 329; Beaman *v.* Whitney, 21 Me. 413.

5 Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

6 Brown *v.* Lunt, 37 Me. 423.

7 Ridgely *v.* Howard, 3 Har. & McH. 321.

8 Scanlan *v.* Wright, 13 Pick. 523; 25 Am. Dec. 344.

9 Moore *v.* Vance, 1 Ohio, 12.

10 Share *v.* Anderson, 7 Serg. & R. 43; 10 Am. Dec. 41; and see Gittings *v.* Hall, 1 Har. & J. 14; 2 Am. Dec. 502. That a justice of the peace may take an acknowledgment out of his own county: see Odiorne *v.* Mason, 9 N. H. 24.

11 See Ingraham *v.* Grigg, 13 Smedes & M. 22; Morse *v.* Clayton, 13 Smedes & M. 373; Crowley *v.* Wallace, 12 Mo. 143; Chandler *v.* Spear, 22 Vt. 388; Augier *v.* Schieffelin, 72 Pa. St. 106; 13 Am. Rep. 659.

12 Brooks *v.* Chaplin, 3 Vt. 281; 23 Am. Dec. 209; and see Fuhrman *v.* London, 13 Serg. & R. 386; 15 Am. Dec. 608.

13 Galusha *v.* Sinclear, 3 Vt. 394. See Robertson *v.* Sullivan, 2 Yerg. 108; Pierce *v.* Brown, 24 Vt. 165.

14 Rackleff *v.* Norton, 19 Me. 274.

15 Rackleff *v.* Norton, 19 Me. 274.

16 Johnson *v.* Haines, 2 Ohio, 55; 15 Am. Dec. 533. Compare Van Ness *v.* Banks, 13 Peters, 7; Pierce *v.* Hakes, 23 Pa. St. 231. The certificate must show that the acknowledgment was taken by an officer authorized by law: Cassell *v.* Cooke, 8 Serg. & R. 268; 11 Am. Dec. 610.

17 Jackson *v.* Osborn, 2 Wend. 555; 20 Am. Dec. 649; and see Thurman *v.* Cameron, 24 Wend. 87.

18 Shaw *v.* Poor, 6 Pick. 86; Catlin *v.* Ware, 9 Mass. 218.

19 Heeter *v.* Glasgow, 79 Pa. St. 79; 21 Am. Rep. 46; Lickmon *v.* Harding, 65 Ill. 505.

20 Heeter *v.* Glasgow, 79 Pa. St. 79; 21 Am. Rep. 46; Miller *v.* Wentworth, 82 Pa. St. 280; Williams *v.* Baker, 71 Pa. St. 476; McNeely *v.* Rucker, 6 Blackf. 391.

21 Williams *v.* Baker, 71 Pa. St. 476; and see Kerr *v.* Russell, 69 Ill. 666; 18 Am. Rep. 634; Ridgely *v.* Howard, 3 Har. & McH. 321.

22 Miller *v.* Wentworth, 82 Pa. St. 280; Johnson *v.* VanVelsor, 43 Mich. 208; and see Williams *v.* Robson, 6 Ohio St. 510; Hourtienne *v.* Schnoor, 33 Mich. 274; Hays *v.* Hays, 5 Rich. 31; Van Orman *v.* McGregor, 23 Iowa, 300; Wannell *v.* Kern, 57 Mo. 478.

23 Smith *v.* Ward, 2 Root, 378; 1 Am. Dec. 80. As to what omissions may be supplied by proof *aliunde:* see Augier *v.* Schieffelin, 72 Pa. St. 106; 13 Am. Rep. 659.

24 Carroll *v.* Norwood, 1 Har. & J. 178; Wickes *v.* Caulk, 5 Har. & J. 36.

§ 320. Separate acknowledgment of, by married woman.—Generally speaking, a married woman may, in this country, convey her real estate by a deed executed jointly with her husband.[1] But her acknowledgment of the deed, as prescribed by law, is essential to

its validity;[2] and without such acknowledgment the deed is wholly inoperative as to her, whatever may be its effect against the husband.[3] And in many of the States the wife is required by statute to undergo an examination separate and apart from the husband, for the purpose of ascertaining whether she acts voluntarily or by undue influence of the husband.[4] And such examination must be personal, and cannot be by attorney;[5] and the certificate of the magistrate must show that in her examination the requirements of the statute were substantially pursued.[6] But in the absence of fraud, evidence is not admissible as against a *bona fide* purchaser, to prove that the wife's acknowledgment was not taken separate and apart from the husband, as the statute required.[7] The general rule is, that when a wife joins her husband in a deed to convey her estate as to a *bona fide* purchaser for value, without notice of fraud or imposition in the procurement of the execution of the deed, the certificate of the magistrate who takes the acknowledgment is conclusive as to every material fact expressed therein;[8] but as to him who has notice, or who has parted with no valuable consideration, the wife may avoid the instrument by showing that she was entrapped into the execution of it by craft or treachery, or compelled thereto by force.[9] Acts of the legislature enacted to cure defects in the acknowledgment of deeds by married women are constitutional, although they extend to deeds acknowledged previous to their passage;[10] but it is held that such acts do not affect judgments rendered prior to their passage.[11] And such legislation is sustainable only because it is supposed not to operate upon the deed or contract by changing it, but upon the mode of proof.[12]

1 § 283, *ante*.

2 Steffey *v.* Steffey, 19 Md. 5; Hepburn *v.* Dubois, 12 Peters, 345; Constantine *v.* Van Winkle, 2 Hill, 240; Bruce *v.* Wood, 1 Met. 542; Platt *v.* Battells, 28 Vt. 685.

3 Grove *v.* Todd, 41 Md. 633; 20 Am. Rep. 76; Gebb *v.* Rose, 40 Md. 387; Mariner *v.* Saunders, 5 Gilm. 113; and see Beal *v.* Harmon, 38 Mo. 435; Drury *v.* Foster, 2 Wall. 24; Churchill *v.* Monroe, 1 R. I. 209.

4 See 2 Kent Com. 150, *et seq.*; Etheridge *v.* Forebee, 9 Ired. 312; Bryan *v.* Stump, 8 Gratt. 241; Elliott *v.* Piersoll, 1 McLean, 13; Meriam *v.* Harsen, 2 Barb. Ch. 232. The separate acknowledgment of deeds by married women is no longer required in New York: see chap. 300, Laws of 1880. Nor is it required in Massachusetts: White *v.* Groves, 107 Mass. 325; 9 Am. Rep. 28.

5 Dawson *v.* Shirley, 6 Blackf. 531. So the execution of the deed must be her own personal act, and it is not sufficient that her husband signs her name, though in her presence and by her direction: Linsley *v.* Brown, 13 Conn. 192; and see Sumner *v.* Conant, 10 Vt. 9.

6 Elwood *v.* Klock, 13 Barb. 50; Owen *v.* Norris, 5 Blackf. 479; Daniel *v.* Priest, 12 Miss. 544; Johnston *v.* Wallace, 53 Miss. 331; 24 Am. Rep. 699; Etheridge *v.* Forebee, 9 Ired. 312; Ives *v.* Sawyer, 4 Dev. & B. 55; Meddock *v.* Williams, 12 Ohio, 377.

7 Johnston *v.* Wallace, 53 Miss. 331; 24 Am. Rep. 699; § 319, *ante*.

8 Singer Manuf. Co. *v.* Rook, 84 Pa. St. 442; 24 Am. Rep. 204.

9 Heeter *v.* Glasgow, 79 Pa. St. 79; 21 Am. Rep. 46; and see Baldwin *v.* Snowden, 11 Ohio St. 203; Williams *v.* Woodard, 2 Wend. 486; Hartley *v.* Fresh, 6 Tex. 216; § 319, *ante*.

10 Tate *v.* Slooltzfoos, 16 Serg. & R. 35; 16 Am. Dec. 546; Shonk *v.* Brown, 61 Pa. St. 321; Dulany *v.* Tilghman, 6 Gill & J. 461; Watson *v.* Mercer, 8 Peters, 88; and see Dentzell *v.* Waldie, 30 Cal. 139; Goshorn *v.* Purcell, 11 Ohio St. 641. But compare Rich *v.* Flanders, 39 N. H. 304.

11 Barnet *v.* Barnet, 15 Serg. & R. 72; 16 Am. Dec. 516; and compare Grove *v.* Todd, 41 Md. 633; 20 Am. Rep. 76.

12 Journeay *v.* Gibson, 56 Pa. St. 57; Watson *v.* Mercer, 8 Peters, 88.

§ 321. Registration of.—In the United States provision is made by statute for the registration of all deeds and conveyances of land;[1] but registration is not requisite to the validity of a deed between the parties.[2] An unregistered deed is void only as to creditors and subsequent *bona fide* purchasers without notice.[3] A conveyance duly acknowledged and registered is constructive notice to and conclusive on all persons claiming through or under the grantor.[4] And it is a well-established rule, recognized both at law and in equity, that if a subsequent purchaser has actual or presumptive notice at the time of his purchase of any prior unregistered conveyance, he shall not be permitted to avail himself of his title against that conveyance.[5] Creditors are also bound by notice of an unregistered deed.[6] A deed must be legally recordable and duly recorded according to law, in order to make the record thereof constructive notice.[7] An index of the record of conveyances is not notice;[8] but a deed filed for record and recorded is notice, although the officer fail to

index it.[9] And a deed once duly recorded is thenceforth notice to all the world, even though the record be totally destroyed.[10] And it is held that a deed, though registered after the expiration of the time limited by statute for recording deeds, is notice to all purchasers after the conveyance has been placed upon record.[11] The fact of notice to a subsequent purchaser sufficient to supply the want of registry of a prior deed may be inferred from circumstances as well as proved by direct evidence;[12] but the proof must be such as to affect the conscience of the purchaser, and so strong and clear as to fix upon him the imputation of *mala fides*.[13] And it is held that a purchaser is not affected with constructive notice of a prior unrecorded conveyance by the mere fact that he was one of the subscribing witnesses thereto.[14] And knowledge merely of an intended conveyance is not sufficient notice.[15]

1 See 4 Kent Com. 456; West *v.* Randall, 2 Mason, 306; Morton *v.* Robard, 4 Dana, 258; Dawson *v.* Thruston, 2 Hen. & M. 132. The admission of a deed to record is a mere ministerial act: Dawson *v.* Thruston, 2 Hen. & M. 132. And registry laws are to be liberally construed: Fort *v.* Burch, 6 Barb. 60. Compare Peck *v.* Mallams, 10 N. Y. 518; Sinclair *v.* Slawson, 44 Mich. 123; 38 Am. Rep. 235. No system of registration prevails generally in England, but registry acts have been in force in certain English counties since the time of Anne: 2 Greenl. Cruise, 848, 863; Honeycomb *v.* Waldron, 2 Strange, 1064. It is, however, a common practice to enroll a deed for safe custody by having it transcribed upon the records of the court, whereby it becomes a deed recorded, but the enrollment is evidence only against the party who sealed the deed, and those claiming under him: 2 Greenl. Cruise, 867. See Jackson *v.* Wood, 12 Johns. 74; Givan *v.* Doe, 7 Blackf. 210; Chandler *v.* Chandler, 55 Cal. 267.

2 McCaskle *v.* Amarine, 12 Ala. 17; Hill *v.* Epley, 31 Pa. St. 335; Wood *v.* Chapin, 13 N. Y. 509; Walker *v.* Coltraine, 6 Ired. Eq. 79; Belk *v.* Massey, 11 Rich. 614.

3 M'Connell *v.* Reed, 2 Scam. 374; Snodgrass *v.* Ricketz, 13 Cal. 359; Losey *v.* Simpson, 3 Stockt. Ch. 246; Vance *v.* M'Nairy, 3 Yerg. 171; Bellas *v.* McCarty, 10 Watts, 13; Van Rensselaer *v.* Clark, 17 Wend. 25, Derbes *v.* Romero, 32 La. An. 927.

4 Schutt *v.* Large, 6 Barb. 373; Flynt *v.* Arnold, 2 Met. 619; Bates *v.* Norcross, 14 Pick. 231; Doe *v.* Beardsley, 2 McLean, 412; Johnson *v.* Stagg, 2 Johns. 510; Rogers *v.* Burchard, 34 Tex. 453; 7 Am. Rep. 283; Tilton *v.* Hunter, 25 Me. 11. The date of a registry is of the time of the delivery of the deed with the proper officer, at the office of registration: Dubose *v.* Young, 10 Ala. 365; Gill *v.* Fauntleroy, 8 Mon. B. 177; Davis *v.* Ownsby, 14 Mo. 175; McCabe *v.* Gray, 20 Cal. 509; Metts *v.* Bright, 4 Dev. & B. 173.

5 Jackson *v.* Sharp, 9 Johns. 163; Schutt *v.* Large, 6 Barb. 373; Cor-

liss *v.* Corliss, 8 Vt. 373; Martin *v.* Quattlebam, 3 McCord, 205; Trull *v.* Bigelow, 16 Mass. 418; Draper *v.* Bryson, 17 Mo. 71; Morrison *v.* Wilson, 13 Cal. 494; Watkins *v.* Edwards, 23 Tex. 443; Morrison *v.* Kelly, 22 Ill. 610.

6 Swan *v.* Moore, 14 La. An. 833; Doe *v.* Beardsley, 2 McLean, 421; Jackson *v.* Leek, 19 Wend. 339. See Martin *v.* Dryden, 6 Ill. 188.

7 Pringle *v.* Dunn, 37 Wis. 449; 19 Am. Rep. 772; and see Musgrove *v.* Bonser, 5 Oreg. 313; 20 Am. Rep. 737.

8 Gilchrist *v.* Gough, 63 Ind. 576; 30 Am. Rep. 250. See Pringle *v.* Dunn, 37 Wis. 449; 19 Am. Rep. 772.

9 Chatham *v.* Bradford, 50 Ga. 327; 15 Am. Rep. 692; Mut. Life Ins. Co. *v.* Dake, 87 N. Y. 257; Bishop *v.* Schneider, 46 Mo. 472; 2 Am. Rep. 533; and see Schell *v.* Stein, 76 Pa. St. 398; 18 Am. Rep. 416.

10 Shannon *v.* Hall, 72 Ill. 354; 22 Am. Rep. 146.

11 Frisler *v.* Frisler, 38 Ind. 282; Brannon *v.* May, 42 Ind. 92; Anderson *v.* Dugas, 29 Ga. 440; Leger *v.* Doyle, 11 Rich. 109; McRaven *v.* McGuire, 9 Smedes & M. 34.

12 Troup *v.* Hurlbut, 10 Barb. 354; Hunter *v.* Watson, 12 Cal. 363; Helms *v.* May, 29 Ga. 121; Jones *v.* Loggins, 37 Miss. 546; Watkins *v.* Edwards, 23 Tex. 443.

13 Dooley *v.* Walcott, 4 Allen, 406; Jackson *v.* Given, 8 Johns. 137; Nutting *v.* Herbert, 37 N. H. 346; Dey *v.* Dunham, 2 Johns. Ch. 182; Mundy *v.* Vawter, 3 Gratt. 545.

14 Vest *v.* Michie, 31 Gratt. 149; 31 Am. Rep. 722.

15 Cushing *v.* Heard, 4 Pick. 252; Warden *v.* Adams, 15 Mass. 233. The mere act of recording a deed, when done by the grantor, is only *prima facie* evidence of delivery to the grantee, and is liable to be rebutted: Gilbert *v.* Fire Ins. Co. 23 Wend. 43; Hawkes *v.* Pike, 105 Mass. 560; 7 Am. Rep. 554; Derry Bank *v.* Webster, 44 N. H. 267; Union Mut. Ins. Co. *v.* Campbell, 95 Ill. 267; 35 Am. Rep. 166.

§ 322. Canceling deeds.—Courts of equity have undoubtedly jurisdiction to compel the surrender and cancellation of deeds obtained by fraud, or held for inequitable and unconscientious purposes;[1] and this, notwithstanding the party seeking relief may have a defense at law to the instrument.[2] The suppression by a husband of the fact that his wife was under age at the time of executing a conveyance is sufficient ground for an order setting it aside;[3] and so of false representations to a wife at the time of procuring her acknowledgment of a deed.[4] But a deed void on its face, for want of the acknowledgment required in a conveyance by a married woman, will not, on that ground, be ordered to be set aside.[5] And generally speaking, a court of equity will not compel the owner of a deed to deliver it up as being void, where the defectiveness is apparent on the face of the deed, and

does not require extrinsic evidence to prove it.[6] Merely delivering back the grantor's deed will not operate to divest the grantee's title.[7] Nor will the destruction of the deed, though by mutual consent of all the parties thereto, have this effect.[8] But in some of the States the canceling of an unregistered deed by agreement of parties, with intent thereby to revest the title in the grantor, is permitted to operate as a reconveyance.[9] A title to lands duly authenticated by written evidence will not be set aside on the assumption of a previous lost conveyance, except upon clear proof of the existence and execution of the supposed deed, and so much of its contents as will enable the court to determine the character of the instrument.[10]

1 Hamilton *v.* Cummings, 1 Johns. Ch. 517; Van Doren *v.* Mayor etc. 9 Paige, 388; Walker *v.* Hunter, 27 Ga. 336; Fonda *v.* Sage, 48 N. Y. 187; Hayward *v.* Dimsdale, 17 Ves. 111.

2 Hamilton *v.* Cummings, 1 Johns. Ch. 517.

3 Bryan *v.* Primm, 1 Ill. 33. Compare Trippe *v.* Trippe, 29 Ala. 637.

4 Jewett *v.* Linberger, 3 Pittsb. (Pa.) 157.

5 Elliott *v.* Peirsoll, 1 McLean, 11.

6 Peirsoll *v.* Elliott, 6 Peters, 95; Ward *v.* Dewey, 16 N. Y. 519; Gray *v.* Coan, 23 Iowa, 344; Simpson *v.* Lord Howden, 3 Mylne & C. 97.

7 Tomson *v.* Ward, 1 N. H. 9; Botsford *v.* Morehouse, 4 Conn. 550; Taliaferro *v.* Rolton, 34 Ark. 503; Steel *v.* Steel, 4 Allen, 417; Fawcetts *v.* Kinney, 33 Ala. 264; Kimball *v.* Greig, 47 Ala. 230; Kearsing *v.* Kilian, 18 Cal. 491; Ward *v.* Lumley, 5 Hurl. & N. 94. Compare Dodge *v.* Dodge, 33 N. H. 495; Patterson *v.* Yeaton, 47 Me. 308.

8 Steel *v.* Steel, 4 Allen, 417; Carver *v.* McNulty, 39 Pa. St. 473; Raynor *v.* Wilson, 6 Hill, 469; Girnon *v.* Davis, 36 Ala. 589.

9 See Nason *v.* Grant, 21 Me. 160; Beauchamp's Will, 4 Mon. 361; Faulks *v.* Burns, 16 N. J. Eq. 250.

10 Metcalf *v.* Van Benthuysen, 3 N. Y. 424.

§ 323. Reformation of deeds.—Mistakes in deeds may be reformed in equity, and especially in cases where the mistake consists in the omission or insertion of words or clauses contrary to the intention of the parties.[1] But, as a general rule, mistakes in such instruments can be so reformed only as between the original parties thereto, or those claiming under them in privity;[2] and in the case of a *voluntary* deed, a court of equity will not reform a mistake therein unless under very extraordinary circum-

stances, or by consent of all the parties.[3] Mistake may be shown by parol evidence,[4] but the proof must be satisfactory.[5] And after the lapse of a long period of time, a court of equity will not interfere to reform a deed, except upon the most positive and satisfactory evidence of the intention of the parties at the time of its execution.[6]

1 Black *v.* Stone, 33 Ala. 327; Hendrickson *v.* Wallace, 31 N. J. 604; Darling *v.* Osborne, 51 Vt. 148; O'Neil *v.* Clark, 33 N. J. 444; McTucker *v.* Taggart, 29 Iowa, 478; Walker *v.* Armstrong, 8 DeGex, M. & G. 531. And even where the parties understood the language contained in the deed, if they believed the description corresponded with the actual boundaries of the land intended to be conveyed and were mistaken, the case for a reformation is clearly made out: Bush *v.* Hicks, 60 N. Y. 298; Paine *v.* Upton, 87 N. Y. 327. Compare Barnes *v.* Bartlett, 47 Ind. 98; Bradford *v.* Bradford, 54 N. H. 463; Farley *v.* Bryant, 32 Me. 474.

2 Simpson *v.* Montgomery, 25 Ark. 365; Baskins *v.* Calhoun, 45 Ala. 562; Rhodes *v.* Outcalt, 46 Mo. 367.

3 Turner *v.* Collins, Law R. 7 Ch. App. 342; Lister *v.* Hodgson, 4 Eq. Cas. 30; Woodruff *v.* Morristown Institution etc. 34 N. J. Eq. 174; Brown *v.* Kennedy, 33 Beav. 133. Compare Eaton *v.* Eaton, 15 Wis. 259; Adair *v.* McDonald, 42 Ga. 506; Custard *v.* Custard, 25 Tex. 49.

4 Bush *v.* Hicks, 60 N. Y. 298; Van Donge *v.* Van Donge, 23 Mich. 321; Huss *v.* Morris, 63 Pa. St. 367.

5 Hileman *v.* Wright, 9 Ind. 126; Durant *v.* Bacot, 13 N. J. Eq. 201; Mulock *v.* Mulock, 31 N. J. Eq. 394.

6 Durant *v.* Bacot, 15 N. J. Eq. 411; Nicoll *v.* Mason, 49 Ill. 358. Compare Hutson *v.* Fumas, 31 Iowa, 154.

§ 324. Quitclaim deeds.—A form of conveyance corresponding with a release at common law, and known as a "quitclaim deed," has long been in use in this country, and in some of the States is recognized by express statute.[1] The operative words of the deed are "release, remise, and quitclaim," and such deed purports to convey and does convey no more than the present interest of the grantor, and does not operate to pass an interest such as may afterward vest.[2] No estoppel can in general arise from a deed of quitclaim;[3] and the grantee is said to take the risk of the title unless there is fraud.[4] But if a grantor has, in fact, a good title, his deed of quitclaim conveys his title and estate as effectually as a deed of warranty.[5] And it has been held that a recorded, unrestricted, quitclaim deed takes precedence of a prior unrecorded

warranty deed of the same premises by the same grantor.[6] On the other hand, it is held that one claiming under a quitclaim deed is not a *bona fide* purchaser within the registry laws.[7] Deeds given by public officers, such as sheriffs, administrators, etc., to purchasers at judicial sales, belong to the class of quitclaim deeds, and the purchaser takes only such interest as the debtor or decedent actually had.[8]

1 See Brown *v.* Jackson, 3 Wheat. 452; Jackson *v.* Hubble, 1 Cowen, 613; Touchard *v.* Crow, 20 Cal. 150; Bogy *v.* Schoab, 13 Mo. 380; Dart *v.* Dart, 7 Conn. 255; Kyle *v.* Kavanagh, 103 Mass. 356; 4 Am. Rep. 560; Kerr *v.* Freeman, 33 Miss. 292.

2 Morse *v.* Godfrey, 3 Story, 365; Bragg *v.* Paulk, 42 Me. 517; Webster *v.* Webster, 33 N. H. 22. See Givan *v.* Doe, 7 Blackf. 212; Hannon *v.* Christopher, 34 N. J. Eq. 459.

3 San Francisco *v.* Lawton, 18 Cal. 465; and see Rogers *v.* Burchard, 34 Tex. 441; 7 Am. Rep. 283.

4 Doyle *v.* Knapp, 4 Ill. 338; Chaffin *v.* Chaffin, 4 Gray, 230; Coe *v.* Persons unknown, 43 Me. 432.

5 Kyle *v.* Kavanagh, 103 Mass. 356; 4 Am. Rep. 560; and see Webster *v.* Webster, 33 N. H. 22; Berry *v.* Billings, 44 Me. 416; Fairley *v.* Fairley, 34 Miss. 18; Pugh *v.* Chesseldine, 11 Ohio, 109; 37 Am. Dec. 414.

6 Brown *v.* Banner Coal and Oil Co. 97 Ill. 214; 37 Am. Rep. 105; Pettingill *v.* Devlin, 35 Iowa, 354; Graff *v.* Middleton, 43 Cal. 341; Frey *v.* Clifford, 44 Cal. 335.

7 Rogers *v.* Burchard, 34 Tex. 441; 7 Am. Rep. 283; Taylor *v.* Harrison, 47 Tex. 454; 26 Am. Rep. 304; Marshall *v.* Roberts, 18 Minn. 405; 10 Am. Rep. 201; Adams *v.* Cuddy, 13 Pick. 460; and see Smith *v.* Bank of Mobile, 21 Ala. 124; Oliver *v.* Piatt, 3 How. 410; Bragg *v.* Paulk, 42 Me. 502; May *v.* Le Claire, 11 Wall. 232.

8 See Love *v.* Jones, 4 Watts, 473; Hamilton *v.* Doolittle, 37 Ill. 473; Ennis *v.* Lead, 1 Ired. Eq. 416; Wilson *v.* Cochran, 14 N. H. 397; Dwight *v.* Newell, 3 N. Y. 185; White *v.* Brocam, 14 Ohio St. 339; Osterman *v.* Baldwin, 6 Wall. 119; Furnival *v.* Coombes, 5 Man. & G. 736.

CHAPTER XXV.

DEVISE.

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§ 325. Definition and nature of.—A conveyance by devise is a disposition of real property in a person's last will and testament, to take effect on the death of the devisor.[1] The power of devising lands is said to have existed in the time of the Saxons, but was taken away upon the introduction of the feudal system, as being inconsistent with the principles of the feudal law.[2] But a custom of devising lands by means of uses became general, and so continued until uses were changed into legal estates by the statute of uses,[3] when this custom was effectually abolished.[4] Soon afterwards, however, by statute 32 Hen. 8, c. 1, known as the statute of wills, every proprietor of land was empowered to devise a portion of it.[5]

This enactment was followed by the explanatory statute of 34 & 35 Hen. 8, c. 5,[6] and upon the abolition of military tenures, in the early part of the reign of Charles II., the disposition of real property by devise became absolute.[7] The English statutes of devise, under such modifications as were deemed expedient, were incorporated into our colonial jurisprudence, and lands may be devised by will in all the States of the Union.[8]

1 2 Blackst. Com. 372; 3 Greenl. Cruise, 3; Hogan v. Jackson, Cowp. 305; Kinnard v. Kinnard, 1 Spear, 256; Turner v. Scott, 51 Pa. St. 126; Carlton v. Cameron, 54 Tex. 72; 38 Am. Rep. 620. A joint will, conditioned to take effect on the death of both, is invalid: Hershy v. Clark, 35 Ark. 17; 37 Am. Rep. 1.

2 2 Blackst. Com. 372, 374; 4 Kent Com. 502, 504. See Marston v. Norton, 5 N. H. 210.

3 See § 151, *ante*; Wright v. Trustees etc. 1 Hoff. Ch. 252.

4 4 Kent Com. 504; Wild's Case, 6 Rep. 16 *b*.

5 2 Blackst. Com. 375; 3 Greenl. Cruise, 5.

6 3 Greenl. Cruise, 5.

7 2 Blackst. Com. 375; 4 Kent Com. 504.

8 See 4 Kent Com. 504; Osgood v. Breed, 12 Mass. 530; Cal. Civ. Code, § 1270, *et seq*.

§ 326. Form of.—The English statute of wills (32 Hen. 8, c. 1) only required that a devise of lands should be in writing, and it was not necessary to its validity that the writing should either be signed by the testator or attested by witnesses.[1] But by a provision in the statute of frauds (29 Cha. 2, c. 3, § 5), it was made necessary to the validity of a devise, not only that it should be in writing, but should also be signed by the party himself, or by some other in his presence and by his direction, and be attested and subscribed in his presence by three or four witnesses.[2] It is not sufficient that a devise be put into writing after the death of the devisor, being first declared by words only, for then it is but a nuncupative will.[3] But no precise form, as it respects the phraseology of the instrument, is requisite to constitute a valid devise, provided it sufficiently indicates the intention of the devisor to dispose of his lands after his decease.[4] Nor is it material in what language, or in what kind of hand-

writing or character, a devise is written;[5] and it is not essential that the parts of the will should be physically connected, if they are connected by their internal sense.[6] Writing on paper or parchment, and with pen and ink, is deemed most advisable;[7] though it seems that the material on which a will is written, and the kind of writing material, whether it be ink or pencil, are immaterial.[8] The formalities required by statute in executing wills in the several States differ in unessential points, but in substance they agree, and the directions given by the English statute of frauds (29 Cha. 2) have generally been adopted.[9]

1 See 3 Greenl. Cruise, 47, 48.

2 3 Greenl. Cruise, 49; 4 Kent Com. 514. The number of witnesses has been reduced to two: Stats. 1 Vict. c. 26; Wms. Real Prop. 168.

3 3 Greenl. Cruise, 49.

4 See Welborn *v.* Weaver, 17 Ga. 267; Johnson *v.* Mitchell, 1 Humph. 172; Jones *v.* Nicolay, 2 Eng. L. & Eq. 591; Alexander *v.* Brame, 35 Eng. L. & Eq. 336; Brewer *v.* Baxter, 41 Ga. 212; 5 Am. Rep. 530; Barber *v.* Barber, 17 Hun, 72.

5 3 Greenl. Cruise, 49; Masters *v.* Masters, 1 P. Wms. 425; Jackson *v.* Merrill, 6 Johns. 185; Jackson *v.* Babcock, 12 Johns. 389; Caulfield *v.* Sullivan, 12 N. Y. Week. Dig. 442.

6 Martin *v.* Hamlin, 4 Strob. 188; Wyckoff's Appeal, 15 Pa. St. 281. Compare Tonnele *v.* Hall, 4 N. Y. 140; Lee *v.* Libb, 1 Show. 66; In the Goods of Horsford, Law R. 3 Pro. & D. 211; 12 Eng. Rep. 672.

7 See 3 Greenl. Cruise, 49; Davis *v.* Shields, 26 Wend. 341.

8 See 2 Greenl. Ev. § 691; In re Dyer, 1 Hagg. 219; Myers *v.* Vanderbelt, 84 Pa. St. 510; 24 Am. Rep. 227.

9 4 Kent Com. 513; Osgood *v.* Breed, 12 Mass. 530; Tonnele *v.* Hall, 4 N. Y. 140; Rigg *v.* Wilton, 13 Ill. 15.

§ 327. What law controls execution of.—As it respects wills concerning lands, they must be executed according to the forms and solemnities prescribed by the laws of the place where the lands are situated.[1] So in the absence of statutory provisions to the contrary, the *lex rei sitæ* controls as to the capacity or incapacity of the devisor, and the extent of his power to dispose of the property.[2] But by statutory provision in many of the States, a will executed according to the forms prescribed in the State where the testator resides will be admitted to probate in the State where the land is situ-

ated.[3] Formalities of execution are governed by the law existing at the time of execution, but the mode of proof by the law in force when the will is propounded for probate.[4] A statute affecting wills enacted after the will is made, but before the testator's death, is held to take effect on the will.[5]

1 Kerr *v.* Moon, 9 Wheat. 565; United States *v.* Crosby, 7 Cranch, 115; Lynes *v.* Townsend, 33 N. Y. 558; White *v.* Howard, 52 Barb. 294; 46 N. Y. 144; Coppin *v.* Coppin, 2 P. Wms. 293; and see Doe *v.* Vardill, 5 Barn. & C. 438; Freke *v.* Lord Carbery, Law R. 16 Eq. 461; 6 Eng. Rep. 812.

2 Holmes *v.* Remsen, 4 Johns. Ch. 460; 20 Johns. 229; Clark *v.* Graham, 6 Wheat. 577; McCormick *v.* Sullivant, 10 Wheat. 192.

3 See O'Brien *v.* Woody, 4 McLean, 75; Nicholson *v.* Leavitt, 4 Sand. 252; Bayley *v.* Bailey, 5 Cush. 245; Glenn *v.* Thistle, 23 Miss. 42; Depas *v.* Mayo, 11 Mo. 314.

4 Jauncey *v.* Thorne, 2 Barb. Ch. 40.

5 Bishop *v.* Bishop, 4 Hill, 138; Sherman *v.* Sherman, 3 Barb. 385; Wakefield *v.* Phelps, 37 N. H. 295.

§ 328. Who may make.—Generally speaking, all persons who have the power to dispose of their real estate by any conveyance *inter vivos* may dispose of the same by will.[1] Persons excluded by the statute of wills from devising lands are infants, married women, idiots, and persons of non-sane memory.[2] Under this statute, infants embrace all persons who have not yet attained the age of twenty-one years;[3] but in many of the States, females of the age of eighteen years are made competent by statute to devise lands.[4] So the disability of coverture has been in a great measure removed by statutory enactments in the different States,[5] and a married woman may devise her real property in the same manner, and with the like effect, as if she were unmarried.[6] As it respects mental capacity in the testator, it is held to be sufficient if in making his will he understands what he is doing.[7] If then sane, it is immaterial that he was at the time under guardianship as an insane person.[8] Mere eccentricity is not enough to destroy testamentary capacity;[9] neither is extreme old age, nor the fact of being deaf and dumb.[10] And the will of a blind man was ad-

mitted to probate.[11] And it is said that every person who makes a will is presumed to be of sound understanding till the contrary is proved, and that the burden of proof lies on the other side.[12] But upon this point the authorities are conflicting;[13] and in some of them the rule is stated to be, that where a will is offered for probate, the burden of proof is on the person seeking such probate, to show that the testator was at the time of its execution of sound mind.[14] And if a devisor is under disability at the time when the devise is made, it is absolutely void, and the removal of the disability before the death of the devisor does not render it valid.[15]

1 See § 274, *ante*; Davis *v.* Calvert, 5 Gill & J. 269; Rankin *v.* Rankin, 6 Mon. 531; 3 Greenl. Cruise, 12.

2 See Stats. 34 & 35 Hen. 8, c. 5; 2 N. Y. Rev. Stat. 56, § 1; Osgood *v.* Breed, 12 Mass. 225; West *v.* West, 10 Serg. & R. 445; Picquet *v.* Swan, 4 Mason, 443; Shaw's Will, 2 Redf. 107.

3 3 Greenl. Cruise, 12.

4 See Allen *v.* Little, 5 Ohio, 65.

5 See § 283, *ante*. At common law, a *feme covert* cannot make a will: Adams *v.* Kellogg, Kirby, 195; 1 Am. Dec. 18.

6 See Waters *v.* Cullen, 2 Bradf. 354. In England a married woman possesses, under Stats. 1 Vict. c. 26, no greater or different power to make a will than she possessed before that statute: Willock *v.* Noble, Law R. 7 H. L. 588; 13 Eng. Rep. 100.

7 Kinne *v.* Kinne, 9 Conn. 102; Comstock *v.* Hadlyme Ex. Soc. 8 Conn. 254; 20 Am. Dec. 100; Converse *v.* Converse, 21 Vt. 170; Kingsbury *v.* Whitaker, 32 La. An. 1055; 36 Am. Rep. 278; Pidcock *v.* Potter, 68 Pa. St. 342; 8 Am. Rep. 181, 185, note. Compare Cotton *v.* Ulmer, 45 Ala. 378; 6 Am. Rep. 703; Wade *v.* Holbrook, 2 Redf. 378.

8 Breed *v.* Pratt, 18 Pick. 115; Kingsbury *v.* Whitaker, 32 La. An. 1055; 36 Am. Rep. 278; and see Brooks *v.* Barrett, 7 Pick. 94.

9 Hartwell *v.* McMaster, 4 Redf. 389; Brick *v.* Brick, 66 N. Y. 144; Lee *v.* Lee, 4 McCord, 183; 17 Am. Dec. 722. A belief in "spiritualism" does not incapacitate from making a valid will: Brown *v.* Ward, 53 Md. 376; 36 Am. Rep. 422; In re Smith's Will, 53 Md. 426. See also Bonard's Will, 16 Abb. Pr. N. S. 128; Lathrop *v.* American Board etc. 67 Barb. 590.

10 Lowe *v.* Williamson, 2 N. J. Eq. 82; Potts *v.* House, 6 Ga. 324; Higdon's Will, 6 Marsh. J. J. 444; 22 Am. Dec. 84; Children's Aid Soc. *v.* Loveridge, 70 N. Y. 387.

11 Boyd *v.* Cook, 3 Leigh, 32.

12 3 Greenl. Cruise, 14; Att.-Gen. *v.* Parnther, 3 Bro. C. C. 441; Lee *v.* Lee, 4 McCord, 183; 17 Am. Dec. 722; and see Chandler *v.* Ferris, 1 Har. (Del.) 461; Pettes *v.* Bingham, 10 N. H. 515; Irish *v.* Newell, 62 Ill. 196; 14 Am. Rep. 79.

13 See Cramer *v.* Crumbaugh, 3 Md. 491; Crowninshield *v.* Crowninshield, 2 Gray, 524; Cilley *v.* Cilley, 34 Me. 162; Harrison *v.* Rowan, 3 Wash. C. C. 582.

14 Crowninshield *v.* Crowninshield, 2 Gray, 524; Gerrish *v.* Nason, 22 Me. 440; and see Comstock *v.* Hadlyme, 8 Conn. 261; 20 Am. Dec. 100; Wallis *v.* Hodgeson, 2 Atk. 56; Ware *v.* Ware, 8 Me. 42.

15 Arthur *v.* Bokenham, 11 Mod. 157; Brunker *v.* Cook, 11 Mod. 123; Girard *v.* City etc. 4 Rawle, 336.

§ 329. Who may take by.—All natural persons, including infants, *femes covert*, persons of non-sane memory, and aliens, may be devisees.[1] Though formerly doubted, it is now settled that posthumous children may be devisees.[2] A devise even to an illegitimate child *in ventre matris* is valid if the mother is sufficiently described;[3] or such child may take by particular description before its birth.[4] And natural children may take under the description of "children," if the will itself manifests an intent to include them in that term.[5] A wife may take by devise even from her husband, since the devise does not take effect till the death of the husband, by which the marriage is dissolved.[6] An alien may take by devise, and hold against all but the State until office found.[7] In New York a resident alien devisee of a citizen takes, upon acceptance of the devise, a conditional title, absolute as against the heirs of the testator, but defeasible by the State until he complies with the conditions as to aliens.[8] Corporations are expressly disabled by the statute 34 & 35 Hen. 8, c. 5, § 14, from taking by devise.[9] In this country, corporations are competent to take by devise unless expressly disqualified by statute;[10] and they may take under the words "person or persons," and the like.[11] A devise to a person uncertain, as, for instance, to such of the daughters of A as shall marry a person of the name of B, is good.[12] By the rule of the common law, a devise to the heir of the precise estate which he would take by descent, if the particular devise to him was omitted from the will, is void, and he takes by descent, which is the better title.[13] But this rule has been changed by statute in England.[14]

1 4 Kent Com. 506; and see Hall *v.* Hancock, 15 Pick. 255; Mitchell *v.* Blair, 5 Paige, 588.

2 Hone v. Van Schaick, 3 Barb. Ch. 488; Watkins v. Flora, 8 Ired. 374.

3 Pratt v. Flamer, 5 Har. & J. 10. Compare Earl v. Wilson, 17 Ves. 528; Metham v. Devon, 1 P. Wms. 529; Gardner v. Hyer, 2 Paige, 11.

4 Gordon v. Gordon, 1 Mer. 141; Evans v. Massey, 8 Price, 22.

5 Wilkinson v. Adam, 12 Price, 470; Doe v. Clarke, 2 Black. H. 399. Compare Gardner v. Hyer, 2 Paige, 11; Brewer v. Blaugher, 14 Peters, 178; Bayley v. Mollard, 1 Russ. & M. 581; Collins v. Hoxie, 9 Paige, 88.

6 Co. Litt. 112 *a*; 3 Greenl. Cruise, 21.

7 Fox v. Southack, 12 Mass. 143; Fairfax v. Hunter, 7 Cranch, 603; Vaux v. Nesbit, 1 McCord Ch. 352; Doe v. Robertson, 11 Wheat. 332; and see § 287, *ante*.

8 Hall v. Hall, 81 N. Y. 130. See Luhrs v. Eimer, 80 N. Y. 171.

9 See 3 Greenl. Cruise, 22; 4 Kent Com. 507.

10 See Wright v. Trustees etc. 1 Hoff. Ch. 225; Draper v. President etc. 57 How. Pr. 269; King v. Rundle, 15 Barb. 139; Boone Corp. § 53. A devise to the United States is valid: Dickson v. United States, 125 Mass. 311; 28 Am. Rep. 230. Compare Will of Fox, 52 N. Y. 530; 11 Am. Rep. 751. The right of a corporation to take by devise is subject to the general laws of the State in regard thereto, passed subsequent to its incorporation: Kerr v. Dougherty, 79 N. Y. 328.

11 Boone Corp. § 53; and see Boone Corp. § 327.

12 3 Greenl. Cruise, 22. Compare Blackburn v. Sables, 2 Ves. & B. 367; Stokeley v. Gordon, 8 Md. 496.

13 Hurst v. Earl of Winchelsea, 1 Black. W. 187; Van Kleeck v. Dutch Church, 20 Wend. 469; Lord v. Bourne, 63 Me. 368; 18 Am. Rep. 234.

14 Stats. 3 & 4 Will. 4, c. 106, § 3.

§ 330. What may be devised.—A devise applies only to real property, but every species of real property, whether corporeal or incorporeal, may be devised.[1] Not only estates in fee-simple absolute, but also determinable fees and base fees, are devisable.[2] So of any possibility coupled with an interest.[3] And it may be stated generally, that everything which is descendible to heirs may also be devised.[4] But by the rules of the common law a devise operated only upon such real property as the testator owned and was seized of at the time of making the will, and not upon any after-acquired lands;[5] and such was formerly declared to be the law in several of the States.[6] But under the statutes of many of the States, after-acquired lands now pass by devise, if such was the intent of the testator,[7] or, in other States, if the contrary intent does not appear.[8] So the rule of the common law has been changed in England, and after-acquired

lands pass by a devise, unless a contrary intention shall appear in the will.[9]

1 3 Greenl. Cruise, 30; Corbet's Case, 1 Rep. 85 *b*; Wagstaff *v.* Wagstaff, 2 P. Wms. 258; Langford *v.* Pitt, 2 P. Wms. 629; Irwin *v.* Hamilton, 6 Serg. & R. 208; Smith *v.* Jones, 4 Ohio, 121; Phillips *v.* Hele, 1 Ch. R. 101; Ackerley *v.* Vernon, 9 Mod. 78. A devise of the rent of land without any qualification or limitation as to time operates as a devise of the land: Jennings *v.* Conboy, 73 N. Y. 230.

2 Cowper *v.* Frankline, 3 Bulst. 184; Steel *v.* Cook, 1 Met. 281.

3 Jones *v.* Roe, 3 Term Rep. 88; Pond *v.* Bergh, 10 Paige, 149; Kean *v.* Roe, 2 Har. (Del.) 112; Den *v.* Manners, 1 Spenc. 142; and see Deas *v.* Horry, 2 Hill (S. C.) 248.

4 Jackson *v.* Varick, 7 Cowen, 238; 2 Wend. 166; Brigham *v.* Shattuck, 10 Pick. 306; Kean *v.* Roe, 2 Har. (Del.) 112; Watts *v.* Cole, 2 Leigh, 664; 2 N. Y. Rev. Stat. 57, § 2. Compare Goodright *v.* Forester, 8 East, 552. A trust estate will pass under a general clause in a will relating to the realty, unless the intention of the testator appear from the will to be otherwise: Jackson *v.* Delancy, 13 Johns. 536; 7 Am. Dec. 403.

5 Bunter *v.* Coke, 1 Salk. 237; Pistol *v.* Riccardson, 3 Doug. 361; Langford *v.* Pitt, 2 P. Wms. 629; Johnson *v.* Hunly, Tayl. 305; 1 Am. Dec. 590; Meador *v.* Sorsby, 2 Ala. 712; 36 Am. Dec. 432.

6 M'Kinnon *v.* Thompson, 3 Johns. Ch. 307; Minuse *v.* Cox, 5 Johns. Ch. 441; Brewster *v.* McCall, 15 Conn. 274; Foster *v.* Craige, 3 Ired. 536; Carter *v.* Thomas, 4 Me. 341; Blaisdell *v.* Hight, 69 Me. 306; 31 Am. Rep. 278. But see Whittemore *v.* Bean, 6 N. H. 47.

7 See 4 Kent Com. 512; Parker *v.* Bogardus, 5 N. Y. 309; Ellison *v.* Miller, 11 Barb. 332; Lent *v.* Lent, 24 Hun, 436; Wynne *v.* Wynne, 23 Miss. 251; Mullock *v.* Souder, 5 Watts & S. 198; Raines *v.* Barker, 13 Gratt. 128; Winchester *v.* Forster, 3 Cush. 366; Cushing *v.* Aylwin, 12 Met. 169; Blaisdell *v.* Hight, 69 Me. 306; 31 Am. Rep. 278.

8 Carroll *v.* Carroll, 16 How. 275; Kent *v.* McPherson, 7 Har. & J. 320. Subsequently acquired lands at another place do not pass under a devise of all lands of the testator: Blaisdell *v.* Hight, 69 Me. 306; 31 Am. Rep. 278.

9 Stat. 1 Vict. c. 26, § 24.

§ 331. What terms in, pass a fee.—Those technical words which in a deed are absolutely necessary to the creation of particular estates are not required in a devise.[1] Thus, the word "heirs" need not be used in a will in order to create an estate in fee, but any other words or expressions which show an intent on the part of the testator to give an absolute estate will have the same effect.[2] The intention of the testator, as collected from the whole will, is to govern, unless it is otherwise provided by law.[3] A devise to a person generally, or indefinitely, with a power of disposition, carries a fee;[4] but it is otherwise where an estate for life only is devised by certain and

express words, with a power of disposition of the reversion annexed.[5] In a will, the words "all my estate," or "my whole estate," carry a fee;[6] so of the words "all my real property"; or "all my landed property";[7] or "all the rest and residue of my real and personal estate";[8] or "all my goods and effects, both real and personal";[9] or "I give my lands";[10] or the word "property,"[11] or "leasehold," where the intent is clear;[12] or the word "remainder," or "reversion," after a disposition of a particular estate.[13] So a devise of all a person's "right, title, and interest" in a house will pass a fee.[14] A devise charged with the payment of debts and legacies passes a fee-simple.[15] So if a person devises land, with a direction that the devisee shall pay a gross sum out of it, the latter will take an estate in fee-simple.[16] A devise of wild lands in Maine and Massachusetts passes a fee.[17] A devise to trustees in fee, "for the use and benefit of A. B.," without words of limitation, was held to pass the whole beneficial interest, or fee-simple, to A. B.[18] And generally, if the trust is one requiring the trustee to take a fee, it will be so construed.[19]

1 See § 16, *ante*; Jenkins *v.* Clement, 1 Harp. Eq. 72; 14 Am. Dec. 698; Peyton *v.* Smith, 4 McCord, 476; 17 Am. Dec. 758.

2 § 16, *ante*; Fox *v.* Phelps, 17 Wend. 393; Olmstead *v.* Harvey, 1 Barb. 102; Franklin *v.* Harter, 7 Blackf. 488; Baker *v.* Briggs, 12 Pick. 27; Morrison *v.* Semple, 6 Binn. 97; Hammond *v.* Hammond, 8 Gill & J. 437. In the United States, a devise, without words of limitation, conveys all the estate and interest which the testator had in the premises, unless a different intent should be clear from the will itself: see § 16, *ante*; Fay *v.* Fay, 1 Cush. 93; Jackson *v.* Bull, 10 Johns. 148; Reeder *v.* Spearman, 6 Rich. Eq. 88. So, by statute in England (1 Vict. c. 26), a general devise, without words of limitation, passes the testator's whole interest in the premises devised.

3 Morrison *v.* Semple, 6 Binn. 97; Deering *v.* Adams, 37 Me. 264; Saunders *v.* Mathewson, 11 Conn. 149; Pratt *v.* Leadbetter, 38 Me. 9.

4 Jackson *v.* Robins, 16 Johns. 588.

5 Jackson *v.* Robins, 16 Johns. 588; Stevens *v.* Winsnip, 1 Pick. 318; Moore *v.* Webb, 2 Mon. B. 283; Flintham's Case, 11 Serg. & R. 16; Cook *v.* Walker, 15 Ga. 457.

6 Johnson *v.* Kerman, 1 Rolle Abr. 834; Randall *v.* Tuchin, 6 Taunt. 410; Doe *v.* Williams, 1 Ex. 414; Jackson *v.* Merrill, 6 Johns. 185; 5 Am. Dec. 213; Shinn *v.* Holmes, 25 Pa. St. 142; Leland *v.* Adams, 9 Gray, 71; Hammond *v.* Hammond, 8 Gill & J. 437; Briggs *v.* Shaw, 9 Allen, 517. Compare Hart *v.* White, 26 Vt. 260.

7 3 Greenl. Cruise, 277; Foster *v.* Stewart, 18 Pa. St. 23; Fogg *v.*

Clark, 1 N. H. 163; and see Sharp v. Sharp, 6 Bing. 639; Nicholls v. Butcher, 18 Ves. 193.

8 Davenport v. Coltman, 9 Mees. & W. 481; Farmer v. Francis, 2 Sim. & St. 505; McConnel v. Smith, 23 Ill. 611; Donnovan v. Donnovan, 4 Har. (Del.) 177; Parker v. Parker, 5 Met. 134. Compare Doe v. Hurrell, 5 Barn. & Ald. 18.

9 Ferguson v. Zepp, 4 Wash. 645; and see Tanner v. Wise, 2 P. Wms. 295.

10 Smith v. Berry, 8 Ohio, 365. Compare Wright v. Denn, 10 Wheat. 204.

11 See Mayo v. Carrington, 4 Call, 472; Wilce v. Wilce, 7 Bing. 664; Billings v. Billings, 5 Sim. 232; Jackson v. Housel, 17 Johns. 281.

12 Saylor v. Kocher, 3 Watts & S. 163.

13 3 Greenl. Cruise, 281; Cruger v. Hayward, 2 Desaus. 422; Annable v. Patch, 3 Pick. 360; and see Doe v. Lean, 1 Ad. & E. N. S. 229; Lippen v. Eldred, 2 Barb. 130. But see Pelton v. Banks, 1 Vern. 65.

14 Cole v. Rawlinson, 3 Brown Parl. C. 7; and see Merrit v. Abendroth, 24 Hun, 218.

15 Doe v. Richards, 3 Term Rep. 356; Ackland v. Ackland, 3 Vern. 687; Doe v. Phillips, 3 Barn. & Adol. 753; Bell v. Scammon, 15 N. H. 381; Spraker v. Van Alstyne, 18 Wend. 200. See Coone v. Parmentier, 10 Pa. St. 72; Olmstead v. Olmstead, 4 N. Y. 56; Lithgow v. Kavenagh, 9 Mass. 161; Jackson v. Harris, 8 Johns. 141.

16 Doe v. Fyldes, Cowp. 841; Collier's Case, 6 Rep. 16; Willis v. Bucher, 2 Binn. 455.

17 Russell v. Elden, 15 Me. 193; Sargent v. Towne, 10 Mass. 303; and see Holmes v. Pattison, 25 Pa. St. 484.

18 3 Greenl. Cruise, 268; Bass v. Scott, 2 Leigh, 356; and see Knight v. Selby, 3 Man. & G. 92; Doe v. Davies, 1 Ad. & E. N. S. 430.

19 Gibson v. Montfort, 1 Ves. 485; Inman v. Jackson, 4 Me. 237; Pearce v. Savage, 45 Me. 90; Poad v. Watson, 37 Eng. L. & Eq. 112.

§ 332. Signing will.—It is essential to the validity of a devise of lands that it be signed by the testator, or by some other person in his presence and by his direction.[1] It is, however, a sufficient signing if the testator makes his mark, although he may be able to write.[2] And his signature, though imperfectly and indistinctly written, may be regarded as his mark, and thus satisfy the statute.[3] Under the English statute of frauds, if the testator's name be written by himself in any part of a will, it is deemed a sufficient signing.[4] But this rule has been changed by a recent statute in England, which requires a will devising lands to be signed "at the foot or end thereof."[5] And the same alteration has been made by statute in some of the States.[6] The words "at the foot or end thereof" are to be construed strictly,[7] and

wills have frequently been rejected for lack of compliance with the statute in this respect.[8] A seal is not necessary to the validity of a will,[9] and sealing a will is not of itself a sufficient signing.[10]

1 See § 326, *ante*; Stricker *v.* Groves, 5 Whart. 386; Haynes *v.* Haynes, 28 Ohio St. 598; 31 Am. Rep. 579.

2 Harrison *v.* Elvin, 3 Ad. & E. N. S. 117; Addy *v.* Grix, 8 Ves. 504; Keeney *v.* Whitmarsh, 16 Barb. 141; Shinkle *v.* Crock, 17 Pa. St. 159; Ray *v.* Hill, 3 Strob. 297.

3 Hartwell *v.* McMaster, 4 Redf. 389.

4 Lemayne *v.* Stanley, 3 Lev. 1; Morrison *v.* Turnour, 18 Ves. 183; Jackson *v.* Van Dusen, 5 Johns. 144; Sarah Miles' Will, 4 Dana, 1; and see Waller *v.* Waller, 1 Gratt. 454.

5 Stats. 7 Will. 4, and 1 Vict. c. 26, § 9; and explanatory stat. 15 Vict. c. 24.

6 See 2 N. Y. Rev. Stat. 63, § 40; Remsen *v.* Brinckerhoff, 26 Wend. 331; Sisters of Charity *v.* Kelly, 67 N. Y. 409; Tonnele *v.* Hall, 4 N. Y. 140; Barr *v.* Graybill, 13 Pa. St. 396.

7 Ayres *v.* Ayres, 1 Rob. Ecc. 421. See Stat. 15 Vict. c. 24. Compare Sisters of Charity *v.* Kelly, 67 N. Y. 409.

8 See In re Howell, 1 Rob. Ecc. 671; In re Jones, 1 Rob. Ecc. 424. Compare In re Anderson, 1 Eng. L. & Eq. 634; In re Martin, 3 Curt. 754.

9 Avery *v.* Pixley, 4 Mass. 462.

10 Smith *v.* Evans, 1 Wils. 313; Wright *v.* Wakeford, 17 Ves. 459. But compare Lemayne *v.* Stanley, 3 Lev. 1; Lee *v.* Libb, 1 Show. 69.

§ 333. Attestation.—The statute of frauds (29 Cha. 2, c. 8, § 5) requires a devise to be attested and subscribed in the presence of a testator by three or four witnesses.[1] In England the number of witnesses has been reduced to two;[2] and this number is all that is required by statute in some of the States.[3] In Pennsylvania it is sufficient if the execution of the will be proved by two witnesses, and it need not be attested by their signatures.[4] Attestation by a witness making his mark,[5] or by signing only the initials of his name, has been held sufficient.[6] So if the witness adopts his signature already on the instrument, without subscribing it again, the attestation is held to be sufficient.[7] One who signs his name as witness to a will should be satisfied that the testator is of sound and disposing mind.[8] The act of attestation implies a knowledge of the existence of those facts which constitute the legal execution of the instrument as a

valid will;[9] and it is only with the most scrupulous jealousy that the testimony of a subscribing witness will afterwards be admitted to impeach his own act.[10] If the testator acknowledges his signature before the witnesses, it is sufficient, although they do not see him sign his name.[11] So if the testator and witnesses are in the same room, the attestation will be presumed to have been in the presence of the former;[12] and it is not necessary that the fact of the signing in the presence of the testator should appear in the attestation itself.[13] It is not necessary that the witnesses should attest in the presence of each other;[14] and it is held to be immaterial in this country whether they subscribe their names before or after the testator has signed the will.[15] But under the English statute (1 Vict. c. 26, § 9), they must subscribe after the testator has signed.[16] The witnesses to a will must be credible[17] and competent witnesses at the time of attestation.[18] If then competent, no subsequent incompetency will have the effect to invalidate the will, and it may be established by secondary evidence.[19]

1 § 319, *ante*; Ragland *v.* Huntingdon, 1 Ired. 561; Dewey *v.* Dewey, 1 Met. 349; 35 Am. Dec. 367; Harmon *v.* Clark, 13 Gray, 114.

2 By Stat. 1 Vict. c. 26.

3 See 2 N. Y. Rev. Stat. 63, § 40; Remsen *v.* Brinckerhoff, 26 Wend. 331; 8 Paige, 488.

4 Rohner *v.* Stehman, 1 Watts, 442; Stricker *v.* Groves, 5 Whart. 386.

5 Harrison *v.* Harrison, 8 Ves. 185; Baker *v.* Denning, 8 Ad. & E. 94; Adams *v.* Chaplin, 1 Hill Ch. 266; Madison *v.* Zabriskie, 11 La. 251; Den *v.* Mitton, 12 N. J. L. 70.

6 Jackson *v.* Van Dusen, 5 Johns. 144.

7 Pollock *v.* Glassell, 2 Gratt. 439.

8 Scribner *v.* Crane, 2 Paige, 147; Sears *v.* Dillingham, 12 Mass. 358; Doe *v.* Pattison, 2 Blackf. 355; Withinton *v.* Withinton, 7 Mo. 589.

9 Swift *v.* Wiley, 1 Mon. B. 117; and see Chase *v.* Lincoln, 3 Mass. 236.

10 Bootle *v.* Blundell, 19 Ves. 504; Burrows *v.* Locke, 10 Ves. 474; Goodtitle *v.* Clayton, 4 Burr. 2225; Walton *v.* Shelley, 1 Term Rep. 300.

11 Stonehouse *v.* Evelyn, 3 P. Wms. 253; Grayson *v.* Atkinson, 2 Ves. 254; Loy *v.* Kennedy, 1 Watts & S. 396; Adams *v.* Field, 21 Vt. 256; Tilden *v.* Tilden, 13 Gray, 103; Rosser *v.* Franklin, 6 Gratt. 1; Wright *v.* Wright, 7 Bing. 457; Mitchell *v.* Mitchell, 16 Hun, 97; 77 N. Y. 596.

12 Neil *v.* Neil, 1 Leigh, 6, 10; Edelin *v.* Hardey, 7 Har. & J. 61; Lyon *v.* Smith, 11 Barb. 104; White *v.* Trustees etc. 6 Bing. 310.

13 Croft v. Pawlet, 2 Strange, 1109; Brice v. Smith, Willes R. 1.

14 Bond v. Sewell, 3 Burr. 1773; Westbeeck v. Kennedy, 1 Ves. & B. 362.

15 Pollock v. Glassell, 2 Gratt. 439; Swift v. Wiley, 1 Mon. B. 117.

16 In re Byrd, 3 Curt. 117. See Phipps v. Hale, Law R. 3 Pro. & D. 166; 10 Eng. Rep. 521. Under this statute the marriage, after attestation of a will of a devisee to the attesting witness, does not affect the validity of the devise: Thorpe v. Bestwick, L. R. 6 Q. B. D. 311; 29 Eng. Rep. 643.

17 See Curtiss v. Strong, 4 Day, 51; Amory v. Fellowes, 5 Mass. 219; Orndorff v. Hammer, 12 Mon. B. 619.

18 Bacon v. Bacon, 17 Pick. 134; Hans v. Palmer, 21 Pa. St. 296; Fenwick v. Forest, 6 Har. & J. 415; Workman v. Dominick, 2 Strob. 589; Burritt v. Silliman, 16 Barb. 198; Camp v. Stark, 10 Phila. 528; Henderson v. Kenner, 1 Rich. 474. A wife is not a competent witness to her husband's will: Pease v. Allis, 110 Mass. 157; 14 Am. Rep. 591; nor is she a competent witness to a will containing a devise to her husband: Sullivan v. Sullivan, 106 Mass. 474; 8 Am. Rep. 356.

19 Sears v. Dillingham, 12 Mass. 358; Jones v. Scott, 2 Ala. 58; Austey v. Dowsing, 2 Strange, 1253; and see Rugg v. Rugg, 83 N. Y. 592; Cheatham v. Hatcher, 30 Gratt. 56; 32 Am. Rep. 650; Will of John Meurer, 44 Wis. 393; 28 Am. Rep. 591.

§ 334. Publication of will.—By the publication of a devise is meant some act on the part of the devisor which shows that he intended the instrument to operate as a will or devise.[1] And it has been said that publication is an essential part of the execution of the devise, and not a mere matter of form.[2] But no precise form of words is requisite,[3] and publication may be inferred from circumstances.[4] And the opinion has been expressed, that a will is good without publication, unless it is expressly required by statute, or by the power under which the will is made.[5] The execution of the instrument, in the manner prescribed by law, accompanied by the testamentary declaration prescribed, and the attestation of the witnesses, are in truth a publication in the sense in which that term is usually understood.[6] A distinct publication of the will is, however, required by statute in some of the States, as, for instance, in New York;[7] and although no particular form of expression is required, yet the witnesses must know that it is the testator's will, and that he understood it to be so, and intended to execute it as such.[8] But any communication to the witnesses, either by word or deed, or both, which renders it certain

that he intends the instrument which he executes to take validity and effect as a last will and testament, will satisfy the requirement of the statute.[9] And it is held, that publication may be established on the evidence of one attesting witness in opposition to that of the other.[10]

1 3 Greenl. Cruise, 70, 71.

2 Ross *v.* Ever, 3 Atk. 161. See Remsen *v.* Brinckerhoff, 26 Wend. 325; 37 Am. Dec. 251. Ordinarily, the time of publication of a will is referred to its date: Bagwell *v.* Elliott, 2 Rand. 190.

3 Trimmer *v.* Jackson, 4 Burns Ec. L. 119; Warren *v.* Postlethwaite, 2 Colly. C. C. 108; Reese *v.* Crosby, 3 Redf. 74; Burk's Will, 2 Redf. 239.

4 Wallis *v.* Wallis, 4 Burns Ec. L. 114; Ward *v.* Swift, 1 Cromp. & M. 175.

5 Moodie *v.* Reid, 7 Taunt. 355; and see Osborn *v.* Cook, 11 Cush. 532; Watson *v.* Pipes, 32 Miss. 451; Dean *v.* Dean, 27 Vt. 746.

6 Doe *v.* Purdett, 4 Ad. & E. 14; Curtels *v.* Kenrick, 3 Mees. & W. 461; Allen *v.* Everett, 12 Mon. B. 371; Smith *v.* Dolby, 4 Har. (Del.) 350; Small *v.* Small, 4 Me. 220.

7 2 N. Y. Rev. Stat. 63, § 40; Remsen *v.* Brinckerhoff, 26 Wend. 331; 8 Paige, 488; Lewis *v.* Lewis, 11 N. Y. 220. See also Rogers *v.* Diamond, 13 Ark. 474; Den *v.* Mitton, 12 N. J. L. 70.

8 Brown *v.* De Selding, 4 Sand. 10; Tyler *v.* Mapes, 19 Barb. 448; Seymour *v.* Van Wyck, 6 N. Y. 120.

9 Darling *v.* Arthur, 22 Hun, 84; Van Hoffman *v.* Ward, 4 Redf. 244.

10 Johnston *v.* Hatfield, 12 N. Y. Week. Dig. 393. And see White *v.* British Museum, 6 Bing. 310.

§ 335. Revocation of will.—A will does not take effect till after the testator's death,[1] and is, therefore, revocable at any time during his life.[2] Although a person should declare his will to be irrevocable, yet he may revoke it.[3] But the same capacity is required to revoke as to make a will;[4] and an act of revocation when the testator was *non compos* is a nullity.[5] Under the provisions of the statute of frauds, a will may be expressly revoked by a subsequent will, by a codicil duly attested according to the statute, by a writing declaring the testator's intention to revoke his will, or by burning, canceling, tearing, or obliterating the will.[6] A will may also be revoked by implication of law.[7] It is the intention of the testator to revoke his will which constitutes the revocation;[8] and no act of his will amount to a revocation unless it be done *animo revocandi*.[9] A former will is revoked

by a subsequent one, either where the latter contains an express clause of revocation, or makes a new and incompatible disposition of the lands.[10] And this is so, although the subsequent will does not take effect by reason of some disability in the devisee;[11] but it is otherwise if it fails to take effect by reason of some imperfection in itself, or want of due execution.[12] And a subsequent will must first be admitted to probate before it can be availed of as a revocation of a former one.[13] A subsequent will which contains no express words of revocation of a former will, and which makes no disposition inconsistent therewith, does not operate to revoke such former will, and both may stand.[14] But two inconsistent wills of even date, unreconciled by any act of the testator, are both void to the extent of their disagreement.[15]

1 2 Blackst. Com. 502; Martindale *v.* Warner, 15 Pa. St. 471.

2 Vynior's Case, 8 Rep. 82 *a*.

3 Vynior's Case, 8 Rep. 82 *a*; Matter of Michell, 14 Johns. 324; Dan *v.* Brown, 4 Cowen, 490.

4 Ford *v.* Ford, 7 Humph. 92; Nelson *v.* McGiffert, 3 Barb. Ch. 158.

5 Smith *v.* Wait, 4 Barb. 28; Allison *v.* Allison, 7 Dana, 94; Rhodes *v.* Vinson, 9 Gill. 169; Plenty *v.* West, 17 Jur. 9; 15 Eng. L. & Eq. 283; Rich *v.* Gilkey 73 Me. 595; 26 Alb. L. J. 50.

6 See 3 Greenl. Cruise, 82; 4 Kent Com. 520; 2 N. Y. Rev. Stat. 64, § 42; Cal. Civ. Code, § 1292.

7 See Kenebel *v.* Scrafton, 2 East, 530; Graves *v.* Sheldon, 2 Chip. D. 71; 15 Am. Dec. 653; Dow *v.* Edlin, 4 Ad. & E. 582; Burch *v.* Wilkins, 4 Johns. Ch. 506; § 339, *post*.

8 O'Neall *v.* Farr, 1 Rich. 80; Laughton *v.* Atkins, 1 Pick. 543; Griffiths *v.* Grieve, 1 Jacob & W. 8 Bing. 475.

9 Jackson *v.* Halloway, 7 Johns. 394.

10 Boudinot *v.* Bradford, 2 Dall. 268; Plenty *v.* West, 17 Jur. 9; 15 Eng. L. & Eq. 234; Matter of Dowd, 58 How. Pr. 107; Ludlum *v.* Otis, 15 Hun, 410.

11 Laughton *v.* Atkins, 1 Pick. 543.

12 Laughton *v.* Atkins, 1 Pick. 543; Deakins *v.* Hollis, 7 Gill & J. 311; Reid *v.* Borland, 14 Mass. 208; and see Cutto *v.* Gilbert, 29 Eng. L. & Eq. 64.

13 Laughton *v.* Atkins, 1 Pick. 543.

14 Coward *v.* Marshal, Cro. Eliz. 721; Hearle *v.* Hicks, 1 Clark & F. 20; Nelson *v.* McGiffert, 3 Barb. Ch. 158; Brant *v.* Wilson, 8 Cowen, 56. Compare Cutto *v.* Gilbert, 29 Eng. L. & Eq. 64.

15 Phipps *v.* Anglesea, 7 Brown Parl. C. 443. Compare Bryan *v.* White, 14 Jur. 919; 5 Eng. L. & Eq. 579.

§ 336. Revocation by codicil.—A codicil duly executed, and valid in law, has the same effect in revoking a devise, as a subsequent will, provided it contains a clause of revocation, or makes a different disposition of the property.[1] But the intent to revoke must be clear;[2] and a codicil professing an intent to dispose of the estate in a different manner from the will, yet not doing so in fact, is only a revocation *pro tanto*.[3] A codicil executed simultaneously with a will does not operate to revoke the latter.[4]

1 Att.-Gen. *v.* Lloyd, 3 Atk. 552; Hough's Estate, 20 Law J. Rep (N. S.) Ch. 422; 6 Eng. L. & Eq. 61; Lalinson *v.* Lalinson, 17 Jur. 1172; 23 Eng. L. & Eq. 72; Bosley *v.* Bosley, 14 How. 390.

2 Griffiths *v.* Grieve, 1 Jacob & W. 8 Bing. 475; Locke *v.* James, 11 Mees. & W. 901; Brown *v.* Lawrence, 3 Cush. 390.

3 Brant *v.* Wilson, 8 Cowen, 56.

4 Biddles *v.* Biddles, 3 Curt. 458.

§ 337. Revocation by express writing.—Another mode of revocation, provided by the statute of frauds (29 Cha. 2, c. 3, § 6), is by a writing, expressive of an intention to revoke, and signed by the devisor in the presence of three witnesses.[1] But the witnesses are not required to subscribe in the presence of the devisor, as in the case of a devise;[2] hence it is held, that although a will may be revoked by a writing, not attested by three witnesses subscribing in the testator's presence, yet, a second will, though containing a clause revoking all former wills, shall not operate as a revocation, unless it is executed in such a manner as to operate as a devise.[3] Under the statute of many of the States no will can be revoked by another writing of the testator, unless such instrument of revocation is executed with the same formalities with which the will itself is required by law to be executed.[4] As it regards such formalities, the statutes of the particular State should be consulted.[5]

1 See 3 Greenl. Cruise, 91; Onions *v.* Tyrer, 1 P. Wms. 343; Hilton *v.* King, 3 Lev. 86.

2 See § 333, *ante*.

3 3 Greenl. Cruise, 91. Compare Ellis v. Smith, 1 Ves. 12; Howard v. Hollaway, 7 Johns. 394; Barksdale v. Barksdale, 12 Leigh, 535.

4 See 2 N. Y. Rev. Stat. 64, § 42; Lawson v. Morrison, 2 Dall. 289.

5 See 4 Kent Com. 521; 3 Greenl. Cruise, 91, 92, note.

§ 338. Revocation by cancellation, etc.—Revocation of a devise by cancellation is where the instrument of devise is destroyed by burning, tearing, defacing, or some other act of spoliation, with intent thereby to nullify its legal existence as a testament.[1] An act of cancellation, unaccompanied by the intention to revoke, is not a revocation;[2] and therefore, if a will be obliterated by accident, it is no revocation.[3] So the intent to revoke must be that of a sane mind;[4] and a lunatic is incompetent to revoke a will, either by a physical destruction of it, or expressly, by a will in writing.[5] If an intention to revoke exists, the act of cancellation, though very slight, is sufficient.[6] Thus, the act of tearing off the seal,[7] drawing lines across the paper,[8] or partially burning the instrument,[9] has been held to be a sufficient revocation.[10] But the act must be done, and not merely intended to be done, or there will be no revocation;[11] as where the testator ordered his son to throw his will into the fire, and the son, in order to deceive the father, threw in another paper, and saved the will, it was held no revocation.[12] And the cancellation of part of a will, intentionally restricted to that part, operates as a revocation only *pro tanto*.[13] Duplicate copies of a will constitute in law but one will, and a cancellation of one of the copies revokes the whole.[14]

1 3 Greenl. Cruise, 96; Dan v. Brown, 4 Cowen, 483; Johnson v. Brallsford, 2 Nott & McC. 272; Doe v. Harris, 6 Ad. & E. 209; White v. Casten, 1 Jones L. 197.

2 Bethel v. Moore, 2 Dev. & B. 311; Jackson v. Betts, 6 Cowen, 377; Giles v. Warren, Law R. 2 Pro. & D. 401; 3 Eng. Rep. 473; and see Brown v. Thorndike, 15 Pick. 388; Smith v. Fenner, 1 Gall. 170.

3 Burtenshaw v. Gilbert, Cowp. 52; and see Clark v. Scripps, 16 Jur. 733; 22 Eng. L. & Eq. 627; Brunt v. Brunt, Law R. 3 Pro. & D. 37; 5 Eng. Rep. 530.

4 Ford v. Ford, 7 Humph. 92; Smith v. Wait, 4 Barb. 28; Johnson's Will, 40 Conn. 587; Collagan v. Burns, 57 Me. 449.

5 Smith v. Wait, 4 Barb. 28; Brunt v. Brunt, Law R. 3 Pro. & D. 37;

Nelson v. McGiffert, 3 Barb. Ch. 158; Rich v. Gilkey, 73 Me. 595; 26 Alb. L. J. 50. A will can only be canceled by the testator himself, or by some one in his presence, by his express direction: 3 Greenl. Cruise, 98; Haines v. Haines, 2 Vern. 441.

6 Bibb v. Thomas, 2 Black. W. 1043; Johnson v. Brailsford, 2 Nott. & McC. 272.

7 Price v. Powell, 3 Hurl. & N. 341; Avery v. Pixley, 4 Mass. 460.

8 Bethel v. Moore, 2 Dev. & B. 311.

9 Bibb v. Thomas, 2 Black. W. 1043; Doe v. Harris, 6 Ad. & E. 209.

10 See Means v. Moore, 3 McCord, 282; Weeks v. McBeth, 14 Ala. 474; Davis v. Sigourney, 8 Met. 487.

11 Jackson v. Betts, 9 Cowen, 208; 6 Wend. 173; Boyd v. Cook, 3 Leigh, 32.

12 Hise v. Fincher, 10 Ired. 139.

13 Burkitt v. Burkitt, 2 Vern. 498; Boyd v. Martin, 2 Dru. & War. 355; Brown's Will, 1 Mon. B. 57; Bigelow v. Gillott, 123 Mass. 102; 25 Am. Rep. 32; In re Kirkpatrick, 22 N. J. Eq. 463.

14 Burtonshaw v. Gilbert, Cowp. 49; O'Neall v. Farr, 1 Rich. 80.

§ 339. Implied revocation of.—Certain alterations in the social relations of the testator, or in the estate which is the subject of the devise, have been held to operate as implied revocations of a devise.[1] Thus, the subsequent marriage of a testator, followed by the birth of a child, operate to revoke a devise;[2] for the reason that a complete alteration in the situation and duties of the testator is thereby produced.[3] The law annexes to a will the tacit condition that if the testator afterwards marries, and has a child born of such marriage, the will is *ipso facto* revoked.[4] And it is immaterial whether, at the time he made his will, the testator was a bachelor, a widower, or a married man with children.[5] And the birth of a posthumous child sufficiently meets the requirement of the law.[6] At common law the will of an unmarried woman is impliedly revoked by her subsequent marriage;[7] though if the wife survived her husband the will was held to be revived.[8] Any alteration of the testator's estate in the lands devised, as by a conveyance of the whole or a part thereof, operates as a revocation of the devise, either wholly or *pro tanto*, according to the extent of the alienation.[9] And even an agreement to convey lands specifically devised was held to be a revo-

cation of the devise in equity, though not at law.[10] A mortgage of the lands devised is a revocation *pro tanto*.[11] A conveyance to trustees in fee, after a devise, operates as a revocation of the devise, although the testator takes back the old use.[12] But a conveyance procured by fraud or a void conveyance will not operate to revoke a prior devise.[13] And a mere alteration of the *quality* of an estate, without intent to vary the *quantity* of the interest, is no revocation of a previous devise.[14]

1 See Doe *v.* Lancashire, 5 Term Rep. 49; Carter *v.* Thomas, 4 Me. 341; Walton *v.* Walton, 7 Johns. Ch. 258; Havens *v.* Vandenbergh, 1 Denio, 27; Verdier *v.* Verdier, 8 Rich. 135. By the English statute, 1 Vict. c. 26, a will shall be construed to speak at the time of the death of the testator: see Farrar *v.* Winterton, 5 Beav. 1.

2 Christopher *v.* Christopher, 4 Burr. 2182; Doe *v.* Lancashire, 5 Term Rep. 49; Havens *v.* Vandenbergh, 1 Denio, 27; Goodtitle *v.* Otway, 2 Black. H. 522; Burch *v.* Wilkins, 4 Johns. Ch. 506.

3 3 Greenl. Cruise, 104; and see Warner *v.* Beach, 4 Gray, 162; Verdier *v.* Verdier, 8 Rich. 135; Negus *v.* Negus, 46 Iowa, 487; 26 Am. Rep. 157; Ash *v.* Ash, 9 Ohio St. 386.

4 Marston *v.* Roe, 8 Ad. & E. 14; Sneed *v.* Ewing, 5 Marsh. J. J. 460; 22 Am. Dec. 41; and see Kenebel *v.* Scrafton, 2 East, 530; Gibbons *v.* Caunt, 4 Ves. 848. Compare Brady *v.* Cubitt, Doug. 31.

5 Havens *v.* Vandenbergh, 1 Denio, 27; Doe *v.* Lancashire, 5 Term Rep. 49.

6 Doe *v.* Lancashire, 5 Term Rep. 49; Fallon *v.* Chidester, 46 Iowa, 588; 26 Am. Rep. 164. Compare Doe *v.* Barford, 4 Maule & S. 10. The rules stated in the text have been modified by statutory provisions in several of the States, and the statute of the particular State should be consulted: see 2 N. Y. Rev. Stat. 64, § 43; Smith *v.* Robertson, 24 Hun, 210; Wilson *v.* Foster, 6 Met. 400; Tomlinson *v.* Tomlinson, 1 Ashm. 224; Wheeler *v.* Wheeler, 1 R. I. 354; Jacks *v.* Henderson, 1 Desaus. 557; Ordish *v.* McDermott, 2 Redf. 460.

7 Hodsden *v.* Lloyd, 2 Bro. C. C. 534; Doe *v.* Staples, 2 Term Rep. 696; 4 Kent Com. 527; Proctor *v.* Clark, 3 Redf. 445. Compare Brown *v.* Clark, 16 Hun, 559; 77 N. Y. 369.

8 Forse *v.* Hembling, 4 Rep. 61 *a*; 3 Greenl. Cruise, 110. Compare Morwan *v.* Thompson, 3 Hagg. 239.

9 Sparrow *v.* Hardcastle, 3 Atk. 799; Wiggin *v.* Swett, 6 Met. 194; Howes *v.* Humphrey, 9 Pick. 361; Herrington *v.* Budd, 5 Denio, 321; Arthur *v.* Arthur, 10 Barb. 9; Rose *v.* Rose, 7 Barb. 174; Brigham *v.* Winchester, 1 Met. 390.

10 Cotter *v.* Layer, 2 P. Wms. 626; Rider *v.* Wager, 2 P. Wms. 328; Donohoo *v.* Lea, 1 Swan, 119; Walton *v.* Walton, 7 Johns. Ch. 258.

11 McTaggart *v.* Thomson, 14 Pa. St. 149.

12 Walton *v.* Walton, 7 Johns. Ch. 258; Marwood *v.* Turner, 3 P. Wms. 163.

13 Wright *v.* Littler, 3 Burr. 1244; Hawes *v.* Wyatt, 3 Bro. C. C. 156; Mathews *v.* Venables, 2 Bing. 136.

14 Brydes *v.* Chandos, 2 Ves. 417; Sparrow *v.* Hardcastle, 3 Atk. 798; Livingston *v.* Livingston, 3 Johns. Ch. 156.

§ 340. Republication of.—A devise once revoked may be revived by a republication of the will, the effect of which is the opposite of that of revocation.[1] And a will originally void and inoperative by reason of the incapacity of the testator may be rendered valid and operative by a republication, after the testator becomes capacitated to make a valid will.[2] One mode of republication is by a re-execution of the will, and, prior to the statute of frauds, any words importing an intention to republish amounted to a republication.[3] Since the statute, it was at first held that there could be no implied republication, but that the paper containing the devise must be re-executed.[4] It was, however, settled by later decisions, that a codicil, duly attested, whether attached to the will or not, operates as a republication of such will, and passes after-acquired lands.[5] The effect of the codicil, if not neutralized by internal evidence of a contrary intention, is to republish the will.[6] But if the effect of a codicil is expressly confined to the lands devised by the will, it will not operate to pass after-acquired lands.[7] The cancellation of a second will may operate as a republication of a prior uncanceled will.[8] But nothing short of a re-execution of a will once canceled will amount to a republication thereof.[9]

1 See 3 Greenl. Cruise, 142; Van Cortland *v.* Kip, 1 Hill, 590; Haven *v.* Foster, 14 Pick. 541.

2 Braham *v.* Burchell, 3 Add. 243; O'Neall *v.* Farr, 1 Rich. 80.

3 3 Greenl. Cruise, 142. See Battle *v.* Speight, 10 Ired. 459.

4 Martin *v.* Savage, 1 Ves. 440; 3 Greenl. Cruise, 142.

5 Piggott *v.* Waller, 7 Ves. 98; Atherton *v.* Robins, 1 Ad. & E. 423; Murray *v.* Oliver, 6 Ired. Eq. 55; Jack *v.* Shoenberger, 22 Pa. St. 416; Van Cortland *v.* Kip, 1 Hill, 590; Jackson *v.* Potter, 9 Johns. 312; Walt *v.* Belding, 24 Pick. 129; Harvey *v.* Chouteau, 14 Mo. 587. See Haven *v.* Foster, 14 Pick. 534.

6 Van Cortland *v.* Kip, 1 Hill, 590; Movers *v.* White, 6 Johns. Ch. 375; Doe *v.* Marchant, 6 Man. & G. 813; Doe *v.* Walker, 12 Mees. & W. 591.

7 Pigott *v.* Waller, 7 Ves. 124; Strathmore *v.* Bowes, 7 Term Rep. 482.

8 3 Greenl. Cruise, 151, 152. Compare James *v.* Cohen, 3 Curt. 770; Flintham *v.* Bradford, 10 Pa. St. 82; 4 Kent Com. 531; Matter of Simpson, 56 How. Pr. 125.

9 Harwood v. Goodright, Cowp. 92. See Jackson v. Potter, 9 Johns. 312; Witter v. Mott, 2 Conn. 67. In England, a will once revoked can only be revived by the re-execution thereof, or by a codicil showing an intent to revive it: Stat. 1 Vict. c. 26, § 22. Similar provisions exist in the statutes of some of the States: See 2 N. Y. Rev. Stat. 66, § 53.

§ 341. When void. By the common law, if the testator disposes of his estate as the law would have done had he been silent, the will, being unnecessary, is void;[1] as where a person devises his real estate in fee to his heir at law, the devise is a mere nullity, and the heir will take by descent, which is the better title.[2] But a difference in the *quality* of the estate will give effect to the devise;[3] and so, it seems, where the estate differs in point of *quantity*.[4] Fraud or imposition practiced upon the testator will invalidate a devise.[5] So a devise may be void for uncertainty, either as it respects the person or object of the testator's bounty,[6] or the thing devised.[7] But a devise will seldom be declared void for uncertainty unless the instrument of devise be incapable of any clear meaning whatever.[8] A devisee may by deed renounce and disclaim a devise, in which case the devise becomes void, and the lands descend to the heir.[9] An alteration of a will by a party claiming under it invalidates the will and avoids a devise.[10]

1 See § 329, *ante*.

2 Lord v. Bourne, 63 Me. 368; 18 Am. Rep. 234; Sedgwick v. Minot, 6 Allen, 171; Buckley v. Buckley, 11 Barb. 43.

3 Bear's Case, 1 Leon. 112; 3 Greenl. Cruise, 158.

4 Scott v. Scott, Amb. 383; and see Swaine v. Burton, 15 Ves. 371. But see Doe v. Timins, 1 Barn. & Ald. 530.

5 Webb v. Claverden, 2 Atk. 424; Kerrick v. Bransby, 7 Brown Parl. C. 437; and see Johnson's Will, 40 Conn. 587; Collagan v. Burns, 57 Me. 449; Brunt v. Brunt, Law R. 3 Pro. & D. 37; Parramore v. Taylor, 11 Gratt. 220; Florey v. Florey, 24 Ala. 241; Waterman v. Whitney, 11 N. Y. 157; Allman v. Pigg, 84 Ill. 149; 25 Am. Rep. 303; Brick v. Brick, 66 N. Y. 144.

6 Weatherhead v. Sewell, 9 Humph. 272; 11 How. 329; White v. Fisk, 22 Conn. 31; Gallego v. Att.-Gen. 3 Leigh, 450; Townsend v. Downer, 23 Vt. 225; Pugh v. Goodtitle, 3 Brown Parl. C. 454; Adams v. Jones, 16 Jur. 159; 9 Eng. L. & Eq. 269; Adye v. Smith, 44 Conn. 60; 26 Am. Rep. 424.

7 Jubber v. Jubber, 9 Sim. 503; Att.-Gen. v. Hinkman, 2 Jacob & W. 270; Lucas v. Duffield, 6 Gratt. 456; Bayeaux v. Bayeaux, 8 Paige,

333. A devise to the testator's wife, for life or widowhood, with remainder after her death or marriage to her children, is in restraint of marriage and void: Stilwell *v.* Knapper, 69 Ind. 558; 35 Am. Rep. 240; and see Coon *v.* Bean, 69 Ind. 474.

8 Mason *v.* Robinson, 2 Sim. & St. 295; and see Vernor *v.* Henry, 6 Watts, 192; Den *v.* M'Murtrie, 3 Green, (N. J.) 276; and see Timberlake *v.* Harris, 7 Ired. Eq. 183; M'Cullough *v.* Gilmore, 11 Pa. St. 370.

9 3 Greenl. Cruise, 170; and see Doe *v.* Smyth, 6 Barn. & C. 112; Ives *v.* Allyn, 13 Vt. 609; Webster *v.* Gilman, 1 Story, 499, 514; Ex parte Fuller, 2 Story, 330.

10 Jackson *v.* Malin, 15 Johns. 293. A will may be valid although the draughtsman is a beneficiary under it: Cheatham *v.* Hatcher, 30 Gratt. 56; 32 Am. Rep. 650.

§ 342. How construed.—A devise is not to be construed strictly, like a deed, but liberally, and according to the intent.[1] The intention of the testator, as collected from the entire will with its codicils, must prevail, if not inconsistent with the rules of law.[2] Words are, in general, to be taken in their ordinary and grammatical sense, in the absence of a clear intention to the contrary.[3] And a construction which will give them all effect is to be preferred to one which will render some of them inoperative.[4] Technical words are presumed to be used in their legal sense, where a contrary intention is not apparent.[5] But if the testator's intention is plain, it will control the legal operation of the words, however technical.[6] Introductory words will be regarded by the courts in determining the intention of the testator, where such intention is doubtfully expressed.[7] And a dubious expression may be explained by a codicil, or even by a schedule annexed to the will.[8] Words obviously miswritten may be corrected.[9] If the intention of the testator appears to require it, the word "or" may be construed "and," and *vice versa*.[10] And the word "her" has been construed to mean "their," in order to effect the intent.[11] A palpable omission of a word may be supplied;[12] and a word which is irreconcilable with the general scope of the will, and in conflict with the expressed intentions of the testator, may be rejected.[13] General words in one part of a will may be restrained by subsequent particular ones, and so construed as not to defeat the intent of the testator.[14] A

will of real property must be construed according to the laws of the place where the lands, the subject of the devise, are situated.[15]

1 Brearley *v.* Brearley, 9 N. J. Eq. 21; Den *v.* McMurtrie, 15 N. J. L. 276; Dellis *v.* Goldschmidt, 19 Ves. 569; Hall *v.* Stephens, 65 Mo. 670; 27 Am. Rep. 307.

2 Lynch *v.* Pendergast, 67 Barb. 501; Westcott *v.* Cady, 5 Johns. Ch. 343; 9 Am. Dec. 306; Berry *v.* Berry, 1 Har. & J. 421; Stokes *v.* Tilley, 9 N. J. Eq. 130; Finlay *v.* King, 3 Peters, 346; Land *v.* Odey, 4 Rand. 313; Richardson *v.* Noyes, 2 Mass. 58; Bonard's Will, 16 Abb. Pr. N. S. 128; Reid *v.* Hancock, 10 Humph. 368.

3 Doe *v.* Thomas, 1 Man. & G. 335; Jones *v.* Posten, 1 Ired. 166; Mowatt *v.* Carow, 7 Paige, 328; Hone *v.* Van Schaik, 4 N. Y. 538.

4 Mowatt *v.* Carow, 7 Paige, 328.

5 Read *v.* Backhouse, 2 Russ. & M. 546; Den *v.* Blackwell, 15 N. J. L. 386.

6 Den *v.* Blackwell, 15 N. J. L. 386; Lasher *v.* Lasher, 13 Barb. 106; Dow *v.* Dow, 36 Me. 211; Vauchamp *v.* Bell, 6 Madd. 343; Boisseau *v.* Aldridges, 5 Leigh, 222; 27 Am. Dec. 600.

7 Barheydt *v.* Barheydt, 20 Wend. 576; Hogan *v.* Jackson, Cowp. 306; and see Beal *v.* Holmes, 6 Har. & J. 205.

8 3 Greenl. Cruise, 177; Hayes *v.* Foorde, 2 Black. W. 698.

9 Keith *v.* Perry, 1 Desaus. 353.

10 Walsh *v.* Peterson, 3 Atk. 193; Penny *v.* Turner, 15 Sim. 368; Roome *v.* Phillips, 24 N. Y. 463; Linstead *v.* Green, 2 Md. 82; Mitchell *v.* Mitchell, 18 Md. 405; Shands *v.* Rogers, 7 Rich. Eq. 422; Morris *v.* Morris, 17 Jur. 966; 21 Eng. L. & Eq. 152. "Or" may be substituted for "with" where such substitution will make clear the intent of the testator: Hallowell's Estate, 11 Phila. 55.

11 Keith *v.* Perry, 1 Desaus. 353.

12 Hall *v.* Thompson, 23 Hun, 334; Covenhoven *v.* Schuler, 2 Paige, 122; 21 Am. Dec. 73.

13 Lattimer *v.* Blumenthal, 61 How. Pr. 360; Mason *v.* Jones, 2 Barb. 229; and see Bartlett *v.* King, 12 Mass. 543; Lynch *v.* Hill, 6 Munf. 114; Rawson *v.* Clark, 38 Me. 223; Chambers *v.* Brailsford, 18 Ves. 368; 19 Ves. 552; Evens *v.* Griscom, 42 N. J. L. 579; 36 Am. Rep. 542.

14 3 Greenl. Cruise, 176. Compare Doe *v.* Applin, 4 Term Rep. 82; Doe *v.* Charlton, 1 Man. & G. 429; Doe *v.* Gallini, 5 Barn. & Adol. 621; 2 Ad. & E. 341.

15 Trotter *v.* Trotter, 4 Bligh N. S. 502. Compare § 328, *ante*.

§ 343. Inconsistent clauses.—If two provisions in a will are totally inconsistent and irreconcilable, so that both cannot stand, the rule as apparently settled is that the latter shall prevail.[1] But every effort should be made to reconcile the conflicting clauses before rejecting either.[2]

1 Sims *v.* Doughty, 5 Ves. 243; 6 Ves. 102; Bradstreet *v.* Clark, 12 Wend. 602; Fraser *v.* Boone, 1 Hill Ch. 367; Pierce *v.* Ridley, 1 Bart.

145; 25 Am. Rep. 769; Deering v. Adams, 37 Me. 264. Compare Bradly v. Amidon, 10 Paige, 235; Weatherhead v. Baskerville, 11 How. 369; Brown v. Cleveland, 59 How. Pr. 233; Roseboom v. Roseboom, 81 N. Y. 356; Moore v. Sanders, 15 S. C. 440; 40 Am. Rep. 703.

2 Pue v. Pue, 1 Md. Ch. 382; Malcolm v. Malcolm, 2 Cush. 472; Baird v. Baird, 7 Ired. Eq. 265; Pace v. Bonner, 27 Ala. 307; Van Vachten v. Keator, 63 N. Y. 52.

§ 344. Description of property.—A devise is always construed liberally;[1] and words which denote with sufficient certainty the property intended to be devised will be deemed enough by way of description.[2] The words "lands, tenements, and hereditaments" will pass every species of real property,[3] even including money directed to be laid out in the purchase of land.[4] The words "all my lands" will pass a house where a contrary intention is not apparent from other clauses.[5] The word "estate," unless controlled by the context, passes every kind of real property.[6] So the word "property" will pass real estate;[7] so of the words "all I am worth";[8] or the words "all my right."[9] And a devise of the "rents, profits, and income" of lands will pass the land itself.[10] So real property will pass under the description of "personal," such being clearly the testator's intention.[11] And the word "legacy" may apply to real estate where the intent so requires.[12] And land may be devised with reference to its value, without a description by metes and bounds.[13] An additional description of the thing intended to be devised will not vitiate the devise, and if false must be rejected.[14] An equity of redemption will pass by the same words as other real property.[15]

1 See § 343, *ante*.

2 Pond v. Bergh, 10 Paige, 149; Woods v. Moore, 4 Sand. 579. See § 332, *ante*.

3 3 Greenl. Cruise, 226.

4 Rashleigh v. Master, 3 Bro. C. C. 99; Doe v. Thomas, 1 Man. & G. 335; Parker v. Marchant, 5 Man. & G. 498.

5 Ewer v. Hayden, Cro. Ellz. 477.

6 Doe v. White, 1 Ex. 526; Archer v. Deneale, 1 Peters, 585; Amory v. Meredith, 7 Allen, 397. Compare § 16, *ante*; Foster v. Stewart, 18 Pa. St. 23; Wheeler v. Dunlap, 13 Mon. B. 291; Barnes v. Patch, 8 Ves. 604.

7 Morrison v. Hoppe, 15 Jur. 737; 5 Eng. L. & Eq. 199; and see Den v. Payne, 5 Hayw. 104.

8 Huxstep v. Brooman, 1 Bro. C. C. 437. See also Pitman v. Stevens, 15 East, 505; Dewey v. Morgan, 18 Pick. 295; § 332, *ante*.

9 Rosetter v. Simmons, 6 Serg. & R. 452.

10 Kerry v. Derrick, Cro. Jac. 104; Anderson v. Greble, 1 Ashm. 136.

11 Doe v. Tofield, 11 East, 246. The words "give, devise, and bequeath" pass an estate of inheritance in lands in Pennsylvania: Kane's Estate, 11 Phila. 72.

12 Hardacre v. Nash, 5 Term Rep. 716; Newkerk v. Newkerk, 2 Caines, 345.

13 Neilson v. Neilson, 6 Paige, 106.

14 Doe v. Roe, 12 Wend. 578; and see Emmert v. Hays, 89 Ill. 11; Evens v. Griscom, 42 N. J. L. 579; Slingsby v. Grainger, 7 H. L. Cas. 273, 282.

15 Philips v. Hele, 1 Charlt. R. M. 101; 3 Greenl. Cruise, 281, 262.

§ 345. Description of devisee.—As it respects the description of devisees, it is enough if the words sufficiently denote the persons intended by the testator, distinguishing them from all other persons.[1] A devise is to be liberally expounded in favor of the devisee;[2] and the cases are numerous in which persons have been let in as devisees, although they were not within the precise terms of the will.[3] A devise to Margaret, daughter of A., was held to be good as a devise to her, although her name was Margery.[4] Under a devise to William P., eldest son of Charles P. of T., who had an eldest son but his name was Andrew, it was held that Andrew was entitled to take.[5] A nickname or a name by reputation given by the testator sufficiently designates the devisee.[6] And a bastard may take under a devise to him by a name gained by reputation.[7] The word "children" in a will must be understood in its primary sense and simple signification when that can be done;[8] and if there is nothing in the will to show that the testator intended to use the word in a different sense, it will not be held to include illegitimate offspring, step-children, children by marriage only, grandchildren, or more remote descendants.[9] The word "issue" embraces both children and grandchildren;[10] but the whole context of the will must be taken into consideration, and the word will be held to mean children upon a

slight indication that such was the testator's intent.[11] The word "descendants" is a good term of description, and includes all who proceed from the body of the person named.[12] A devise to a person by the designation of "heir" is void, unless it is shown by the will that heir *apparent* was intended.[13] The word "relations" and "family" will be understood to mean "next of kin," unless the context requires a different interpretation.[14] The words "nearest relation" in a will are to be taken collectively, as much as kindred or heir, and do not mean some single person.[15]

1 Rivers' Case, 1 Atk. 410; Bate *v.* Amherst, Raym. T. 82; Doe *v.* Hallett, 1 Maule & S. 124; and see Adams *v.* Jones, 16 Jur. 159; 9 Eng. L. & Eq. 269; Bernasconi *v.* Atkinson, 23 Law J. Rep. N. S. 184; 23 Eng. L. & Eq. 207; Gardner *v.* Hyer, 2 Paige, 11.

2 See § 343, *ante;* Carter *v.* Balfour, 19 Ala. 814; Voorhees *v.* Voorhees, 6 N. J. Eq. 1.

3 See Royle *v.* Hamilton, 4 Ves. 439; Barnasconi *v.* Atkinson, 23 Law J. Rep. N. S. 184; 23 Eng. L. & Eq. 207; Izard *v.* Izard, 2 Desaus. 303; Havergal *v.* Harrison, 7 Beav. 49.

4 Gynes *v.* Kemsley, 1 Freem. 293.

5 Pitcairne *v.* Brase, Finch, 403; and see Doe *v.* Huthwaite, 3 Barn. & Ald. 632.

6 Ryers *v.* Wheeler, 22 Wend. 150; and see Beaumont *v.* Fell, 2 P. Wms. 141.

7 Swaine *v.* Kennerley, 1 Ves. & B. 469; Wilkinson *v.* Adam, 1 Ves. & B. 422; Rivers' Case, 1 Atk. 410.

8 Palmer *v.* Horn, 84 N. Y. 516.

9 Ward *v.* Sutton, 5 Ired. Eq. 421; Cramer *v.* Pinckney, 3 Barb. Ch. 475; Hughes *v.* Hughes, 12 Mon. B. 115; Mowatt *v.* Carow, 7 Paige, 328; Collins *v.* Hoxie, 9 Paige, 88; Van Voorhis *v.* Brintnall, 23 Hun, 260; Castner's Appeal, 88 Pa. St. 478.

10 Kingsland *v.* Rapelye, 3 Edw. Ch. 1; and see Merest *v.* James, 1 Brod. & B. 484; Luddington *v.* Kime, 1 Raym. Ld. 203; Minter *v.* Wraith, 13 Sim. 52; Pope *v.* Pope, 21 Law J. Rep. N. S. Ch. 276; 9 Eng. L. & Eq. 193; Williams *v.* Teale, 6 Hare, 239; Womrath *v.* M'Cormick, 51 Pa. St. 504.

11 Palmer *v.* Horn, 84 N. Y. 516; Pruen *v.* Osborne, 11 Sim. 132; Voller *v.* Carter, 28 Eng. L. & Eq. 267; Jackson *v.* Merrill, 6 Johns. 185.

12 Crossly *v.* Clare, Amb. 397. See Beals *v.* Crisford, 13 Sim. 592; Styth *v.* Monro, 6 Sim. 49; Mowatt *v.* Carow, 7 Paige, 328.

13 Heard *v.* Horton, 1 Denio, 165; Burchett *v.* Durdant, 2 Vent. 311. Compare Smith *v.* Folwell, 1 Binn. 546; Daly *v.* James, 8 Wheat. 495; Fiske *v.* Keene, 35 Me. 349; Bowes *v.* Porter, 4 Pick. 198.

14 Grant *v.* Lyman, 4 Russ. 292. A devise to A and family is to A and his wife and children: Hall *v.* Stephens, 65 Mo. 670; 27 Am. Rep. 302. Compare Pigg *v.* Clark, Law R. 3 Ch. Div. 672.

15 3 Greenl. Cruise, 222; Pyot *v.* Pyot, 1 Ves. 335. See Doe *v.* Over, 1 Taunt. 263.

§ 346. Devises to charitable uses.—It was formerly held in England, in consequence of the statute of 43 Eliz. c. 4, called "the statute of charitable uses," that a devise to a corporation for a charitable use was valid, as operating in the nature of an appointment.[1] But by statute of 9 Geo. 2, c. 36, devises to charitable uses, with certain exceptions,[2] are rendered void.[3] In this country every corporation is competent to take and hold real estate by devise, unless expressly disqualified by statute;[4] and it has even been held that a devise to a voluntary unincorporated association may be valid.[5] And devises for purposes denominated "charitable" are such favorites with our courts, that all instruments where they are concerned are liberally construed, in order that they may be sustained.[6] Although great uncertainty may exist as it respects the persons or objects of the devise, yet the court will execute it as nearly as it can.[7] The devise will not be defeated if the intended object thereof can be identified.[8]

1 3 Greenl. Cruise, 22. See Att.-Gen. *v.* Brenton, 2 Ves. 425; Att.-Gen. *v.* Mayor etc. 1 Bligh N. S. 347; Grimes *v.* Harmon, 35 Ind. 198; Shotwell *v.* Mott, 2 Sand. Ch. 45.

2 See Att.-Gen. *v.* Goddard, 1 Turn. & R. 348; Att.-Gen. *v.* Tancred, 3 Ves. 641.

3 3 Greenl. Cruise, 22; Corbyn *v.* French, 4 Ves. 427; Att.-Gen. *v.* Weymouth, Amb. 20; Finch *v.* Squire, 10 Ves. 41.

4 Boone Corp. § 53.

5 Boone Corp. § 327; and see Crum's Appeal, 66 Pa. St. 474.

6 Adye *v.* Smith, 44 Conn. 60; 26 Am. Rep. 424; Brown *v.* Kelsey, 2 Cush. 243; Ould *v.* Washington Hospital, 95 U. S. 303; Girard *v.* Philadelphia, 7 Wall. 1; Preacher's Aid Society *v.* Rich, 45 Me. 552; Power *v.* Cassidy, 79 N. Y. 602; 35 Am. Rep. 550; Simpson *v.* Welcome, 72 Me. 496; 39 Am. Rep. 349; Rhymer's Appeal, 93 Pa. St. 142; 39 Am. Rep. 736.

7 Moggridge *v.* Thackwell, 7 Ves. 36; Dexter *v.* Gardner, 7 Allen, 243; Bliss *v.* American Bible Soc. 2 Allen, 334; Crafton *v.* Frith, 20 Law J. Rep. N. S. Ch. 198; 3 Eng. L. & Eq. 164; City of Philadelphia *v.* Girard's Heirs, 45 Pa. St. 28. Compare Beekman *v.* Bonsor, 23 N. Y. 298; Gilman *v.* Hamilton, 16 Ill. 225; Brown *v.* Concord, 33 N. H. 285; Holmes *v.* Mead, 52 N. Y. 332; Boone Corp. § 340.

8 See First Baptist Church *v.* Robberson, 71 Mo. 326; Miller *v.* Atkinson, 63 N. C. 537; Henser *v.* Harris, 42 Ill. 425; Nichols *v.* Allen, 130 Mass. 211; 39 Am. Rep. 445.

§ 347. Lapsed devise.—A lapse is a failure of the devise by the death of the devisee in the lifetime of the

testator.[1] And by the rule of the English law, although the devise be to A and his heirs, yet if A dies before the testator, his heirs will not take anything by the devise, the word "heirs" being used only as a word of limitation to denote the quantity of estate given, and not to describe the heirs of A, or to give them anything.[2] But an English statute has altered this rule of law, by a provision that if the devisee dies in the lifetime of the testator, leaving issue alive at the testator's death, the devise does not lapse, unless a contrary intent appears in the will.[3] And similar statutory provisions have been enacted in many of the States of the Union.[4] But if the devisee dies, leaving no issue alive at the death of the testator, the devise lapses by the common law.[5] In case of a devise to several in succession, and the first devisee refuses, or is incapacitated to take, the devise does not lapse, but passes to the next in succession.[6] An interest which has lapsed by the death of the devisee, in the lifetime of the testator, descends to the heir at law of the testator, notwithstanding a general residuary devise contained in the will.[7] An estate devised upon a trust does not lapse by the death of the trustees in the lifetime of the testator.[8] But land devised upon a trust which is void, as tending to create a perpetuity, descends to the heir.[9]

1 Burt. Real Prop. § 275; 3 Greenl. Cruise, 162. See Andrew v. Bible Soc. 4 Sand. 156.

2 Brett v. Rygden, Plow. 341; Hutton v. Simpson, 2 Vern. 722; Busby v. Greenslate, 1 Strange, 445; Warner v. White, 3 Brown Parl. C. 435; and see Anderson v. Parsons, 4 Me. 486; Strong v. Ready, 9 Humph. 168; Fisher v. Hill, 7 Mass. 86; Gore v. Stephens, 1 Dana, 203. The words "and to his heirs forever," in a devise, do not pass any estate to the heirs of a devisee, unless from the whole will it was clearly the intent of the testator: Rhodes v. June, 15 N. Y. Week. Dig. 326; Gill v. Bronwer, 37 N. Y. 549; Thurber v. Chambers, 66 N. Y. 42.

3 Stat. 1 Vict. c. 26, § 33. See Griffiths v. Gale, 12 Sim. 354; Johnson v. Johnson, 3 Hare, 157.

4 See, as to the statute of Pennsylvania: Martindale v. Warner, 15 Pa. St. 471. California: Cal. Civ. Code, § 1310. A wife is not a relation of her "husband" within a statute saving from lapse a devise to a "child or other relation" of the testator's, who dies before the testator: Cleaver v. Cleaver, 30 Wis. 96; 20 Am. Rep. 30.

5 Ballard v. Ballard, 18 Pick. 41.

6 DeKay v. Irving, 5 Denio, 646; Yeaton v. Roberts, 28 N. H. 459; Perry v. Logan, 5 Rich. 202.

7 Doe v. Underdown, Willes, 293; Brewster v. McCall, 15 Conn. 274; Ferguson v. Hedges, 1 Har. (Del.) 524; Hayden v. Stoughton, 5 Pick. 528; Greene v. Dennis, 6 Conn. 293; 16 Am. Dec. 58.

8 Att.-Gen. v. Downing, Amb. 571.

9 Hillyard v. Miller, 10 Pa. St. 326.

CHAPTER XXVI.

JOINT ESTATES.

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§ 348. In general.—Real property owned by a single person is said to be held in *severalty;* that is, he holds it in his own right only, without any other person being joined with him in point of interest, during his estate therein.[1] Such property is usually held in this way, and therefore the general rules and doctrines respecting es-

tates, nothing appearing to the contrary, are supposed to have reference to estates held in severalty.[2] But the title to real property is sometimes vested in two or more persons, and this has given rise to joint estates, three kinds of which are known to the common law, namely: estates in joint tenancy, in coparcenary, and in common.[3]

1 2 Blackst. Com. 179; 1 Greenl. Cruise, 829.

2 2 Blackst. Com. 179.

3 2 Blackst. Com. 179; 1 Greenl. Cruise, 828; 4 Kent Com. 357

§ 349. Nature of a joint tenancy.—An estate in joint tenancy occurred, at common law, where lands or tenements were granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will.[1] And there may be also an estate of joint tenancy in remainder.[2] All the persons named in the instrument as grantees take a joint estate, and are called joint tenants.[3] An equal interest is created in all the persons who take under the grant;[4] and a grant which defines the interest which each is to take does not create a joint tenancy, but a tenancy in common.[5] For the purposes of tenure and survivorship, each joint tenant is the holder of the whole estate;[6] but for purposes of alienation, each has only his own share.[7] Prior to the abolition of tenures, title by joint tenancy was favored by the English law,[8] but since that time the title has been less favorably regarded by the courts;[9] and in this country it is the general statutory rule that every estate granted or devised to two or more persons is to be deemed a tenancy in common, unless a different tenure is clearly expressed or implied in the instrument creating the estate.[10] In some of the States, however, the case of joint trustees is specially excepted from the operation of the statutes, and the rules of the common law govern.[11]

1 2 Blackst. Com. 180; 1 Greenl. Cruise, 829; Martin v. Smith, 5 Binn. 16; 6 Am. Dec. 395.

2 Co. Litt. 183 b; 1 Greenl. Cruise, 830; and see Campbell v. Heron, 1 Tayl. 199; Wiggin v. Wiggin, 43 N. H. 561.

3 Litt. 277; 1 Greenl. Cruise, 829.

4 Co. Litt. 180 *b*; Coster *v.* Lorillard, 14 Wend. 336; Shiels *v.* Stark, 14 Ga. 429.

5 Craig *v.* Taylor, 6 Mon. B. 457.

6 Coster *v.* Lorillard, 14 Wend. 336.

7 1 Washb. Real Prop. 406; Wms. Real Prop. 112; and see Rector *v.* Waugh, 17 Mo. 13.

8 See Wms. Real Prop. 109; Rigden *v.* Vallier, 3 Atk. 734; Martin *v.* Smith, 5 Binn. 16; 6 Am. Dec. 400; 4 Kent Com. 361.

9 Rigden *v.* Vallier, 3 Atk. 734; Fisher *v.* Wigg, 1 P. Wms. 14, n.; and see Bambaugh *v.* Bambaugh, 11 Serg. & R. 191; Martin *v.* Smith, 5 Binn. 16.

10 See 1 N. Y. Rev. Stat. 727, § 44; Miller *v.* Miller, 16 Mass. 59; Wiswall *v.* Wilkins, 5 Vt. 87; Nichols *v.* Denny, 37 Miss. 59; Evans *v.* Brittain, 3 Serg. & R. 135. An estate in joint tenancy is not known in Ohio: Wilson *v.* Fleming, 13 Ohio, 68; Miles *v.* Fisher, 10 Ohio, 1. And it is said not to exist in Connecticut: Phelps *v.* Jepson, 1 Root, 48. But see Benedict *v.* Gaylord, 11 Conn. 337.

11 See 1 N. Y. Rev. Stat. 727, § 44; Parsons *v.* Boyd, 20 Ala. 112; Greer *v.* Blanchar, 40 Cal. 194; Webster *v.* Vandeventer, 6 Gray, 428. It is said that the principal use of a joint tenancy in England now is to vest estates in trustees: Wms. Real Prop. 111.

§ 350. Joint tenancy, how created.—An estate in joint tenancy can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law.[1] And at common law, if an estate be granted to a plurality of persons, as, for instance, to A and B, and their heirs, without any restrictive, exclusive, or explanatory words, this makes them immediately joint tenants in fee of the lands.[2] But joint tenancies not being now favored, either at law or in equity,[3] the courts are inclined to seize upon any expression indicating an intention to give a separate interest to each.[4] And such a tenancy will never be inferred where a testator meant division.[5] A joint tenancy may be created as well by disseizin as by deed or devise, and joint disseizors may be joint tenants.[6]

1 2 Blackst. Com. 180; Freem. Cotenancy, § 17. See McPherson *v.* Snowden, 19 Md. 230.

2 2 Blackst. Com. 180; § 350, *ante*; and see Rigden *v.* Vallier, 3 Atk. 731; Dott *v.* Wilson, 1 Bay, 457; Webster *v.* Vandeventer, 6 Gray, 428; Hannau *v.* Towers, 3 Har. & J. 147; 5 Am. Dec. 427; Whitridge *v.* Barry, 42 Md. 151; Gilbert *v.* Richards, 7 Vt. 208.

3 § 350, *ante*.

4 Galbraith *v.* Galbraith, 3 Serg. & R. 392; Partridge *v.* Colegate, 3 Har. & McH. 399; Duncan *v.* Forrer, 6 Binn. 193.

5 Martin v. Smith, 5 Binn. 16; Bagley v. Cook, 3 Drew. 662; Gordon v. Atkinson, 1 De Gex & S. 478; Hart v. Marks, 4 Bradf. 161; Robertson v. Fraser, Law R. 6 Ch. App. 699; Ryves v. Ryves, Law R. 11 Eq. 541.

6 Putney v. Dresser, 2 Met. 583; Allen v Holton, 20 Pick. 458.

§ 351. Properties of joint tenancy.—The properties of an estate in joint tenancy are derived from its unity, viz., of interest, title, time, and possession; in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.[1] As it respects unity of interest, one joint tenant cannot be entitled to one period of duration or quantity of interest, and the other to a different one.[2] Thus, one cannot be tenant for life and the other for years, nor can one be tenant in fee and the other in tail;[3] but it is said that, if an estate be limited to two persons, and to the heirs of one of them, they are joint tenants for life.[4] Unity of title requires that the estate of joint tenants must be created by the same act or instrument, whether legal or illegal, as by one and the same grant, or by one and the same disseizin.[5] And unity of time requires that the estate be vested in all the joint tenants at the same period, as well as by the same title.[6] In respect to unity of possession, joint tenants are said to be seized *per my et per tout;* that is, each of them has the entire possession, as well of every part as of the whole.[7]

1 2 Blackst. Com. 180; 1 Greenl. Cruise, 832, 833; Overton v. Lacy, 6 Mon. 13; 17 Am. Dec. 111.

2 2 Blackst. Com. 181.

3 Co. Litt. 188.

4 1 Greenl. Cruise, 831, 833. See Cray v. Willis, 2 P. Wms. 530.

5 2 Blackst. Com. 181.

6 Co. Litt. 188; 1 Greenl. Cruise, 834; 2 Blackst. Com. 181.

7 2 Blackst. Com. 182; Overton v. Lacy, 6 Mon. 13; 17 Am. Dec. 111; § 350, *ante.*

§ 352. Survivorship.—From the intimate union of interest and possession which exists between joint ten-

ants, there arises the most important incident of an estate in joint tenancy, namely, the *jus accrescendi*, or right of survivorship;[1] by which it is meant that, upon the death of one joint tenant, the enire estate remains to the survivors, and at length to the last survivor, and does not pass to the heirs or other representatives of the deceased co-tenant.[2] The survivor shall alone be entitled to the whole estate, whatever it be, which was created by the original grant.[3] Two corporations cannot be joint tenants together, because, each being perpetual, there can be no survivorship between them.[4] And a corporation cannot be a joint tenant with a natural person, for the alleged reason that there is no mutuality of survivorship between them.[5] The incident of survivorship was not favored in equity;[6] and in this country the rule of survivorship has been abolished by statute in many of the States, specially excepting, as already noticed, the case of joint trustees.[7] In other States, devises or grants to several are taken to be tenancies in common, unless the instrument creating the estate expressly declares otherwise, excepting, however, estates to joint trustees.[8]

1 See Co. Litt. 181 *b*; 1 Greenl. Cruise, 836.

2 2 Blackst. Com. 183; Cray *v.* Willis, 2 P. Wms. 530; Brompton *v.* Alkis, 2 Vern. 556; DeWitt *v.* San Francisco, 2 Cal. 289.

3 2 Blackst. Com. 184; Overton *v.* Lacy, 6 Mon. 13; 17 Am. Dec. 111.

4 DeWitt *v.* San Francisco, 2 Cal. 289; Lyster *v.* Kirkpatrick, 26 Up. Can. Q. B. 217.

5 2 Blackst. Com. 184; and see 1 Greenl. Cruise, 839; Telfair *v.* Howe, 3 Rich. Eq. 235.

6 Rigden *v.* Vallier, 3 Atk. 731; Gould *v.* Kemp, 2 Mylne & K. 309; Randall *v.* Phillips, 3 Mason, 386. Compare Barclay *v.* Hendrick, 3 Dana, 380.

7 See § 343, *ante*. Estates of joint trustees are not excepted in New Jersey: Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394; nor in Kentucky: Sanders *v.* Morrison, 17 Mon. 54; 18 Am. Dec. 161.

8 See 1 N. Y. Rev. Stat. 727, § 44; 4 Kent. Com. 361; Shaw *v.* Hearsey, 5 Mass. 522; Sergeant *v.* Steinberger, 2 Ohio, 305; Webster *v.* Vandeventer, 6 Gray, 428; Purdy *v.* Purdy, 3 Md. Ch. 547.

§ 353. Other incidents of joint tenancy.—Among other incidents of an estate in joint tenancy are the following: livery of seizin made to one joint tenant will

inure to all;[1] so an entry or re-entry made by one is as effectual as if it were the act of all;[2] and the occupation by one is *prima facie* an occupation by all.[3] If joint tenants make a lease, and the lessee surrenders to one of them, this will inure to all.[4] If waste of the joint estate be commited by one joint tenant, the other is entitled to an action of waste against him by construction of the statute Westm. 2, c. 22.[5] And by statute 4 & 5 Ann. c. 16, one joint tenant may maintain an action of account against the other, who alone had received the whole profits of the joint estate.[6] Joint tenants must join in an action for the possession of land jointly held;[7] and one can neither sue nor be sued alone, in respect to the joint estate, if advantage be properly taken of the omission to join his co-tenants.[8] Either joint tenant may convey his share of the estate to a co-tenant or to a stranger;[9] but a devise of his share would be inoperative, since the right of survivorship would take precedence of the devise.[10] Nor can one joint tenant bind his co-tenant by a contract for the sale of the joint estate, without prior authority from his co-tenant, or by his subsequent ratification of the contract.[11]

1 Co. Litt. 49 *b*.

2 2 Blackst. Com. 182; 1 Greenl. Cruise, 844.

3 Ford *v.* Grey, 6 Mod. 44; Small *v.* Clifford, 38 Me. 213. Compare Drane *v.* Gregory, 3 Mon. B. 619. There can be neither courtesy nor dower of an estate in joint tenancy: 1 Greenl. Cruise, 842, 843. Dower is allowed by statute in Mississippi: James *v.* Rowan, 6 Smedes & M. 393.

4 2 Blackst. Com. 182; 1 Greenl. Cruise, 844.

5 2 Blackst. Com. 183; Shiels *v.* Stark, 14 Ga. 429.

6 1 Greenl. Cruise, 845; Fanning *v.* Chadwick, 3 Pick. 423. Assumpsit is now the usual remedy: see 4 Kent Com. 369; Sargent *v.* Parsons, 12 Mass. 152.

7 Dewey *v.* Lambier, 7 Cal. 347.

8 2 Blackst. Com. 182; 1 Wms. Saund. 291 *f*; Webster *v.* Vandeventer, 6 Gray, 428. Compare Mitchell *v.* Tarbutt, 5 Term Rep. 651.

9 Rector *v.* Waugh, 17 Mo. 13; Shaw *v.* Hearsey, 5 Mass. 522; Denne *v.* Judge, 11 East, 288; Gates *v.* Salmon, 35 Cal. 588.

10 Co. Litt. 185 *b*; 1 Wash. Real Prop. 412; Duncan *v.* Forrer, 6 Binn. 193.

11 Hanks *v.* Enloe, 33 Tex. 624.

§ 354. Trustees as joint tenants.—Generally speaking, co-trustees are joint tenants of the estate vested in them, and it will go to the survivor.[1] Even in those States where the rule of survivorship is abolished as to ordinary joint estates, an exception is made in the cases of estates given to two or more trustees.[2]

1 Rabe *v.* Fyler, 10 Smedes & M. 440; Shook *v.* Shook, 19 Barb. 653; Parsons *v.* Boyd, 20 Ala. 112; Shartz *v.* Unangst, 3 Watts & S. 45; Gray *v.* Lynch, 8 Gill, 423; Warden *v.* Richards, 11 Gray, 278.

2 See §§ 350, 353, *ante;* Webster *v.* Vandeventer, 6 Gray, 428. A conveyance to a trustee for the use and benefit of two or more persons vests the equitable estate in the *cestuis que trust* as joint tenants: Greer *v.* Blanchar, 40 Cal. 194.

§ 355. Dissolution of joint tenancy.—A joint tenancy may be severed and destroyed by the destruction of any of its constituent unities,[1] except that of time, which, as it relates solely to the commencement of the joint estate, cannot be affected by any subsequent transaction.[2]

1 1 Greenl. Cruise, 847; Denne *v.* Judge, 11 East, 288; Chester *v.* Willan, 2 Saund. 96; Brown *v.* Raindle, 3 Ves. 257; Simpson *v.* Ammons, 1 Binn. 175. See § 367, *post.*

2 2 Blackst. Com. 185; 1 Greenl. Cruise, 847. A mortgage executed by two out of three joint tenants is a severance of the joint tenancy: Simpson *v.* Ammons, 1 Binn. 175; 2 Am. Dec. 425.

§ 356. Estates in coparcenary.—The estate in coparcenary arises, at common law, where a man dies seized of an inheritance, and his next heirs are two or more females or their representatives, in which case the estate descends to all of them jointly, and these co-heirs are called coparceners.[1] So in England this estate arises by particular custom, as in gavelkind, by descent of the lands to all the males in equal degree, as sons, brothers, uncles, etc.[2] In either of these cases all the parceners together make but one heir, and have but one estate among them.[3] Coparceners, like joint tenants, have the same unities of interest, title, and possession.[4] But there is no survivorship incident to this estate,[5] and coparceners always claim by descent, while joint tenants always claim by purchase.[6] Courtesy and dower are, however,

incident to estates in coparcenary.[7] The estate may be dissolved by the alienation of one coparcener to a stranger,[8] by partition,[9] or by the whole at last descending to one of the coparceners.[10] In the United States land descends to all the children, whether male or female, equally, and they take as tenants in common, and not as parceners.[11] Hence the English doctrines relating to estates in coparcenary are deemed of little importance in this country.[12]

1 2 Blackst. Com. 188; 1 Greenl. Cruise, 859.

2 2 Blackst. Com. 188.

3 2 Blackst. Com. 188; Burt. Real Prop. § 316; Hoffar *v.* Dement, 5 Gill, 137; and see Leigh *v.* Shepherd, 2 Brod. & B. 465.

4 1 Greenl. Cruise, 859, 860. See Gill *v.* Fauntleroy, 8 Mon. B. 177; Manchester *v.* Doddridge, 3 Ind. 360.

5 Co. Litt. 164; 4 Kent Com. 364.

6 2 Blackst. Com. 188.

7 1 Greenl. Cruise, 862.

8 1 Greenl. Cruise, 862; Co. Litt. 175 *a*.

9 1 Greenl. Cruise, 863; Burt. Real Prop. § 318; and see Wildy *v.* Barney, 31 Miss. 652.

10 2 Blackst. Com. 191.

11 See 4 Kent Com. 367; 1 Wash. Real Prop. 415; Malcolm *v.* Rogers, 5 Cowen, 188; 15 Am. Dec. 464. In Maryland they take as coparceners: Hoffar *v.* Dement, 5 Gill, 132.

12 See 4 Kent Com. 367; Coles *v.* Wooding, 2 Pat. & H. 197; Campbell *v.* Wallace, 12 N. H. 362; 37 Am. Dec. 219; Stevenson *v.* Cofferin, 20 N. H. 150.

§ 357. Nature of tenancy in common.—A tenancy in common arises where two or more persons hold lands or tenements in fee-simple, or for term of life or years, by several and distinct titles, and occupy the same lands and tenements in common.[1] Unity of right of possession merely is all that is required between tenants in common.[2] One may hold his part in fee, and another for life; one may hold by descent, the other by purchase; the one by purchase from A, the other by purchase from B; the estate of one may have been vested fifty years, of the other but yesterday, and the like.[3] In short, they have several and distinct estates in their respective parts, thus differing from joint tenants who have the land by one

joint title and in one right.[4] And the estate of a tenant in common is subject to the same dispositions, incidents, and charges as an estate owned in severalty.[5] Courtesy and dower are incident thereto;[6] but there is no survivorship among tenants in common,[7] and on the death of one his interest passes to his heirs.[8] Generally speaking, each tenant in common may manage his estate in any way he pleases, provided he does not injure his co-tenants.[9]

1 Co. Litt. 189 *a*; 1 Greenl. Cruise, 868. There is no presumption that the interests of tenants in common are equal: Campau *v.* Campau, 44 Mich. 31.

2 Putnam *v.* Ritchie, 6 Paige, 398; Story *v.* Saunders, 8 Humph. 663; Bernecker *v.* Miller, 40 Mo. 473; Spencer *v.* Austin, 38 Vt. 253.

3 Co. Litt. 189 *a*; 2 Blackst. Com. 191; Putnam *v.* Ritchie, 6 Paige, 390.

4 1 Prest. Est. 137.

5 See Nichols *v.* Smith, 22 Pick. 316; Whitton *v.* Whitton, 38 N. H. 127; Gates *v.* Salmon, 35 Cal. 576; Blessing *v.* House, 3 Gill & J. 290; Shepardson *v.* Rowland, 28 Wis. 108.

6 1 Greenl. Cruise, 879, 880; Brown *v.* Adams, 2 Whart. 188; Sterling *v.* Penlington, 14 Vin. Abr. 511; Sutton *v.* Rolfe, 3 Lev. 84; Blossom *v.* Blossom, 9 Allen, 254; Carr *v.* Givens, 9 Bush, 679; 15 Am. Rep. 747; Ham *v.* Ham, 14 Up. Can. Q. B. 497.

7 Putnam *v.* Ritchie, 6 Paige, 390.

8 Burt. Real Prop. § 38; 1 Greenl. Cruise, 869. An agreement in writing, between tenants in common, that the survivor shall take the other's estate is invalid: Hershy *v.* Clark, 35 Ark. 17; 37 Am. Rep. 1.

9 Peabody *v.* Minot, 24 Pick. 329. One tenant in common may separately insure his interest against fire, and in case of loss, recover and retain the insurance: Harvey *v.* Cherry, 76 N. Y. 436.

§ 358. Creation of tenancy in common.—A tenancy in common may be created by the destruction of an estate in joint tenancy or coparcenary, or by special limitations in a deed or will.[1] Any words in the latter instrument denoting equality of interest will be construed as conferring a tenancy in common.[2] The early common law favored title by joint tenancy;[3] and in England, if several persons own land together, they are deemed joint tenants in the absence of any special reason for a different ownership.[4] But this doctrine is reversed in the United States, and the general rule here is, that "wherever two or more persons acquire the same estate by the same act,

deed, or devise, and no indication is therein made to the contrary, they will hold as tenants in common." [5] The statutes which have effected this change in the law are generally made applicable by their terms, as well to estates already created or vested as to estates thereafter to be granted or devised; [6] and the constitutionality of this provision has been sustained by the Courts.[7]

1 2 Blackst. Com. 192; 1 Greenl. Cruise, 868, 869. There may be a tenancy in common of an inchoate as well as of a perfect right: Wilkins *v.* Burton, 5 Vt. 76; Coleman *v.* Lane, 26 Ga. 515.

2 Harrison *v.* Foreman, 5 Ves. 206; and see Ackerman *v.* Burrows, 3 Ves. & B. 54.

3 See § 350, *ante.*

4 See §§ 350, 351, *ante.*

5 1 Wash. Real Prop. 416; and see 4 Kent Com. 361; Johnson *v.* Harris, 5 Hayw. (3 Tenn.) 113; Young *v.* DeBruhl, 11 Rich. 638; Miller *v.* Miller, 16 Mass. 59; §§ 350, 351, *ante;* Bazemore *v.* Davis, 55 Ga. 504; Harvey *v.* Harvey, 72 N. C. 570.

6 See 1 N. Y. Rev. Stat. 727, § 44; Miller *v.* Miller, 16 Mass. 61.

7 Annable *v.* Patch, 3 Pick. 363; Hills *v.* Doe, 6 N. H. 328; Bombaugh *v.* Bombaugh, 11 Serg. & R. 192. If land is demised to be cultivated on shares, the parties are tenants in common of the crops until a division thereof: Gafford *v.* Stearns, 51 Ala. 434; Carr *v.* Dodge, 40 N. H. 403; Knox *v.* Marshall, 19 Cal. 617. But compare Tanner *v.* Hills, 48 N. Y. 662. But a mere privilege reserved to a person in a dwelling-house for a special purpose and for a limited time does not make him a tenant in common of the estate: Abbott *v.* Wood, 13 Me. 115.

§ 359. Possession by one co-tenant.—In general, the possession of one tenant in common is deemed to be the possession of all.[1] But if one ousts the other or denies his tenure, his possession becomes adverse.[2] The question of ouster is one of intention, to be found by the jury from the overt acts proved in the case.[3] But an ouster may in some cases be presumed by the jury, from an open and exclusive occupancy long continued, as, for instance, for a period of about forty years; [4] or, in one case, for thirty-six years; [5] and in others for twenty years and upwards.[6] The flowing of the land by one of the tenants in common may amount to an ouster of his co-tenants.[7] So where a tenant in common would not suffer a co-tenant or his agent to enter, and denied his title, retaining the exclusive possession himself, it was held an ouster; [8] and so where a tenant in common refused to

pay rent when demanded by his co-tenant, and claimed the whole land.[9] But a mortgage of the whole estate by one tenant in common is not conclusive evidence of an ouster of the other tenants.[10] Nor will the peaceable possession of one tenant in common, unaccompanied by any act amounting to an ouster, be construed as an adverse possession.[11]

1 Jackson *v.* Tibbits, 9 Cowen, 241; Vaughan *v.* Bacon, 15 Me. 455; 33 Am. Dec. 628; Johnson *v.* Toulmin, 18 Ala. 50; Catlin *v.* Kidder, 7 Vt. 12; Thomas *v.* Hatch, 3 Sum. 170; Small *v.* Clifford, 38 Me. 213; Thornton *v.* York Bank, 45 Me. 158; Brown *v.* Wood, 17 Mass. 68. In England the rule is now otherwise by Statute 3 & 4 Will. c. 27, § 12. Where one tenant in common has the charge of the common property for all the others, his knowledge of an easement therein is the knowledge of his co-tenants: Ward *v.* Warren, 82 N. Y. 265.

2 Coleman *v.* Clements, 23 Cal. 245; Harpending *v.* Dutch Church, 16 Peters, 455; Willison *v.* Watkins, 3 Peters, 51; Hart *v.* Gregg, 10 Watts, 185; 36 Am. Dec. 166; Baird *v.* Baird, 1 Dev. & B. Eq. 524; 31 Am. Dec. 399; Newell *v.* Woodruff, 30 Conn. 498.

3 Cummings *v.* Wyman, 10 Mass. 464; Prescott *v.* Nevers, 4 Mason, 330; Blackmore *v.* Gregg, 2 Watts & S. 182; Keyser *v.* Evans, 30 Pa. St. 507. Compare Newell *v.* Woodruff, 30 Conn. 492; Purcell *v.* Wilson, 4 Gratt. 16; Culver *v.* Rhodes, 87 N. Y. 354; Miller *v.* Myers, 46 Cal. 538.

4 Jackson *v.* Whitbeck, 6 Cowen, 632. See Bryan *v.* Atwater, 5 Day, 188.

5 Doe *v.* Prosser, Cowp. 217.

6 Lloyd *v.* Gordon, 2 Har. & McH. 254; Frederick *v.* Gray, 10 Serg. & R. 182; Mehaffy *v.* Dobbs, 9 Watts, 363. And compare Cross *v.* Robinson, 21 Conn. 379; Marr *v.* Gilliam, 1 Cold. 488; Peeler *v.* Guilkey, 27 Tex. 355; Linker *v.* Benson, 67 N. C. 160; Van Dyck *v.* Van Buren, 1 Caines, 84; Kinney *v.* Slattery, 51 Iowa, 353.

7 Great Falls Co. *v.* Worster, 15 N. H. 412; Jones *v.* Weathersbee, 4 Strob. 50.

8 Bracket *v.* Norcross, 1 Me. 89; and see Bigelow *v.* Jones, 10 Pick. 161; Thomas *v.* Pickering, 13 Me. 337; Norris *v.* Sullivan, 47 Conn. 474.

9 Phillips *v.* Gregg, 10 Watts, 158, 192.

10 Hodgdon *v.* Shannon, 44 N. H. 572; Wilson *v.* Collishaw, 13 Pa. St. 276. Compare Leach *v.* Beattie, 33 Vt. 195.

11 Chandler *v.* Ricker, 49 Vt. 128; Squires *v.* Clark, 17 Kan. 84; Hawk *v.* Senseman, 6 Serg. & R. 21; Challefoux *v.* Ducharme, 4 Wis. 554; 8 Wis. 287. And see Small *v.* Clifford, 38 Me. 213; Peck *v.* Ward, 18 Pa. St. 506; Tulloch *v.* Worrall, 49 Pa. St. 140; Culver *v.* Rhodes, 87 N. Y. 354; Trustees etc. *v.* Kirk, 84 N. Y. 220.

§ 360. One co-tenant may sue another.—In the case of an actual ouster of one tenant in common by his co-tenant, the former may sue the latter in ejectment to recover his share of the common estate;[1] and in case of a recovery in such action, trespass for mesne profits may be

brought.[2] And it has been held, that one tenant in common may have trespass *quare clausum fregit* against his co-tenant, where an actual ouster is proved.[3] But, as a general rule, trespass *qu. cl.* cannot be maintained by one tenant in common against another, unless there has been a total destruction of the subject-matter of the tenancy, or some part of it.[4] It seems, however, that an action on the case will lie for a misuse of the common property, though not amounting to a total destruction of it.[5] Thus if one tenant in common of a mill erects a dam below on the same stream upon his several estate, and thereby flows the common property, to the injury of his co-tenant, the latter may maintain an action on the case therefor against him for damages;[6] and so if he diverts the water from their common mill for separate purposes of his own.[7] One tenant in common may have an action of waste against his co-tenant for waste done on the premises;[8] and, in a proper case, an injunction will lie to restrain the commission of waste.[9] If one tenant in common exclusively occupies the whole, or more than his share of the common estate, he is liable to account to his co-tenant for rents and profits in an action of account.[10] But if he occupies the same common property, he is not liable to his co-tenant for rents and profits of the land received by him, unless he received more than his share;[11] though, if he disseizes his co-tenant and ousts him of the possession, this rule is held not to apply.[12] Assumpsit will not lie by a tenant in common against his companion, to recover for the use and occupation of the common property, in the absence of an express contract to pay rent.[13]

1 Peaceable *v.* Read, 1 East, 568; Halford *v.* Tetherow, 2 Jones (N. C.) 333; Noble *v.* McFarland, 51 Ill. 226; Bethell *v.* McCool, 46 Ind. 303; Norris *v.* Sullivan, 47 Conn. 474; Gale *v.* Hines, 17 Fla. 778.

2 Goodtitle *v.* Tombs, 3 Wils. 118; Bennett *v.* Bullock, 35 Pa. St. 367; Cook *v.* Webb, 21 Minn. 428; Camp *v.* Homesley, 11 Ired. 211.

3 Booth *v.* Adams, 11 Vt. 156; McGill *v.* Ash, 7 Pa. St. 397; Erwin *v.* Olmsted, 7 Cowen, 229; Thompson *v.* Gerrish, 57 N. H. 85; Murray *v.* Hall, 7 Com. B. 441; Silloway *v.* Brown, 12 Allen, 37.

4 Cubitt *v.* Porter, 8 Barn. & C. 268; 2 Ryan & M. 272; Maddox *v.* Goddard, 15 Me. 218; Filbert *v.* Hoff, 42 Pa. St. 97; Bennett *v.* Bullock, 35 Pa. St. 364. And compare Roberts *v.* McGraw, 11 Bush, 26; Hastings *v.* Hastings, 110 Mass. 285; Lawton *v.* Adams, 29 Ga. 273.

5 McLellan *v.* Jenness, 43 Vt. 183; 5 Am. Rep. 270; and see Hyde *v.* Stone, 9 Cowen, 230; Lowe *v.* Miller, 3 Gratt. 205; Farr *v.* Smith, 9 Wend. 338; Agnew *v.* Johnson, 17 Pa. St. 373.

6 Odiorne *v.* Lyford, 9 N. H. 502; 32 Am. Dec. 387; Pillsbury *v.* Moore, 44 Me. 154.

7 Blanchard *v.* Baker, 8 Me. 253.

8 Matts *v.* Hawkins, 5 Taunt. 20. On this subject, the statute of the particular State should be consulted: see 4 Kent Com. 369, n.

9 Twort *v.* Twort, 16 Ves. 132; Bailey *v.* Hobson, Law R. 5 Ch. 180; Burt. Real Prop. § 1581; Hawley *v.* Clowes, 2 Johns. Ch. 122.

10 Buckelew *v.* Snedeker, 27 N. J. Eq. 82; Field *v.* Craig, 8 Allen, 357; Gowen *v.* Shaw, 40 Me. 56; Wright *v.* Wright, 59 How. Pr. 176; Pico *v.* Columbe, 12 Cal. 414; Roseboom *v.* Roseboom, 15 Hun, 309; Graham *v.* Pierce, 19 Gratt. 28; Swallow *v.* Swallow, 31 N. J. Eq. 390. See Joslyn *v.* Joslyn, 9 Hun, 388.

11 Keisel *v.* Earnest, 21 Pa. St. 90; Calhoun *v.* Curtis, 4 Met. 413; and see Scott *v.* Guernsey, 60 Barb. 163; 48 N. Y. 106; Jones *v.* Cohen, 8 N. C. 75. If tenants in common sell and convey property, and one receives the entire purchase-money, the other can maintain an action for money had and received, to recover his proportion of the price: Wright *v.* Searles, 50 How. Pr. 176.

12 Sears *v.* Sellen, 28 Iowa, 501. Compare Bazemore *v.* Davis, 55 Ga. 504; Bird *v.* Bird, 15 Fla. 424.

13 Crow *v.* Mark, 52 Ill. 332; Kline *v.* Jacobs, 68 Pa. St. 57. A tenant in common cannot sue his fellow to recover documents relating to their joint estate: Cowes *v.* Hawley, 12 Johns. 484.

§ 361. Actions against strangers.—By the rule of the common law tenants in common must sever in real actions, and may not join because their estates are several.[1] But they must join in actions for injuries to their real estate, as trespass *qu. cl.*, nuisance, and the like, for the reason that the damages belong to them jointly.[2] And if they demise the common estate they must join in the action to recover the rent reserved.[3] But one tenant in common may let his share of the common property, and his co-tenant need not be joined as a plaintiff in an action to recover the rent.[4]

1 Co. Litt. 200 *a*; Malcolm *v.* Rogers, 5 Cowen, 188; 15 Am. Dec. 464, May *v.* Parker, 12 Pick. 34; Hines *v.* Frantham, 27 Ala. 350; Doe *v.* Errington, 1 Ad. & E. 755; Dawson *v.* Mills, 32 Pa. St. 302; Covilland *v.* Tanner, 7 Cal. 38; Stevenson *v.* Cofferin, 20 N. H. 150. One tenant in common may recover the entire common estate in ejectment as against a stranger: Sharon *v.* Davidson, 4 Nev. 416; Hart *v.* Robertson, 21 Cal. 346.

2 Parke *v.* Kilham, 8 Cal. 77; Campbell *v.* Wallace, 12 N. H. 362; 37

Am. Dec. 219; Bullock v. Hayward, 10 Allen, 460; Low v. Mumford, 14 Johns. 426; Decker v. Livingston, 15 Johns. 479; And see De Puy v. Strong, 37 N. Y. 372. But where the tenants in common are not jointly interested in the damages, the remedy may be by a several action: Lothrop v. Arnold, 25 Me. 136; Longfellow v. Quimby, 29 Me. 196.

3 Wall v. Hinds, 4 Gray, 256; Wilkinson v. Hall, 1 Bing. N. C. 713; Sherman v. Ballou, 8 Cowen, 308.

4 Hayden v. Patterson, 51 Pa. St. 261; Powis v. Smith, 5 Barn. & Ald. 851; and see Cook v. Brightly, 40 Pa. St. 439; Muller v. Boggs, 25 Cal. 175. Tenants in common should distrain severally, but their joinder is a mere irregularity: Dutcher v. Culver, 24 Minn. 584.

§ 362. Improvements, repairs, taxes, etc.—At common law, if two persons owned as tenants in common a house or mill which had fallen to decay, and which needed repairs in order to its preservation, either tenant was entitled to his writ, *de reparatione facienda*, to compel his companion to join in making such repairs.[1] But this writ did not extend to other improvements, and in the absence of any statute upon the subject, one tenant in common cannot go on and make expensive and valuable improvements, which are not repairs in the strict sense of that term, and make his co-tenant liable for any part of the same, in the absence of an express or implied contract to pay therefor.[2] And even in the case of necessary repairs, there must be a previous request to join in making them and a refusal so to do, or no action can be sustained.[3] If one tenant in common, with authority to improve the property, does so in good faith, he cannot be held responsible to the other for errors of judgment in making the improvements, but will be entitled to contribution.[4] It is equally obligatory upon each co-tenant to keep the taxes paid,[5] and if one pays them all he is entitled to be reimbursed, with interest.[6]

1 Co. Litt. 200 *b*; and see Carver v. Miller, 4 Mass. 559; Doane v. Badger, 12 Mass. 65; Beaty v. Bordwell, 91 Pa. St. 438.

2 Taylor v. Baldwin, 10 Barb. 582.

3 Mumford v. Brown, 6 Cowen, 475; Crest v. Jack, 3 Watts, 238; Doane v. Badger, 12 Mass. 65; Calvert v. Aldrich, 99 Mass. 74; Thurston v. Dickinson, 2 Rich. Eq. 317.

4 Reed v. Jones, 8 Wis. 421; and compare Hall v. Piddock, 21 N. J. Eq. 311.

5 Morgan v. Herrick, 21 Ill. 481.

6 Morgan v. Herrick, 21 Ill. 481; Oliver v. Montgomery, 39 Iowa, 601; and see Anderson v. Greble, 1 Ashm. 136; Stover v. Cory, 53 Iowa, 78; Harrison v. Harrison, 56 Miss. 174.

§ 363. Conveyances by tenants in common.— One tenant in common may demise or convey his undivided share;[1] but he cannot, as against the rights of his associates, convey his share in any particular part of the estate held in common by metes and bounds.[2] Nor can a judgment creditor of one tenant in common sell by execution a distinct portion of the estate discharged of the rights of the other tenants in common.[3] Nor can one of several joint owners of land dedicate a part of the common property to the public, against his associates.[4] And a mortgage executed by a tenant in common, of an undivided interest in a specified parcel of land, has no validity as against his co-tenants.[5] But it has been held that one tenant in common of separate and distinct parcels of land may convey all his undivided interest in the whole of any one of the distinct parcels, and his deed will be valid and effectual against his co-tenants;[6] and that if an inheritance consists of several distinct freeholds, a tenant in common may convey his undivided interest in any one or more of them, and it may be sold on execution, without reference to any of the other parcels.[7] Upon a conveyance by one tenant in common of his estate to a stranger, the latter will hold in connection with the remaining tenants, merely taking the place in all respects of the grantor.[8]

1 Luther v. Arnold, 8 Rich. 24; Shepardson v. Rowland, 28 Wis. 108; Butler v. Roys, 25 Mich. 53; 12 Am. Rep. 218.

2 Bartlet v. Harlow, 12 Mass. 348; Smith v. Knight, 20 N. H. 9; Good v. Coombs, 28 Tex. 34; Duncan v. Sylvester, 24 Me. 482; Boggess v. Meredith, 16 W. Va. 1; Mattox v. Hightshue, 39 Ind. 95; Boston etc. Co. v. Condit, 19 N. J. Eq. 394; Griswold v. Johnson, 5 Conn. 363; Crocker v. Tiffany, 9 R. I. 505; Tainter v. Cole, 120 Mass. 162; Ballou v. Hale, 47 N. H. 347. He may convey his share in a particular part of the estate, in Maryland: Reinicker v. Smith, 2 Har. & J. 421. In Ohio: Treon v. Emerick, 6 Ohio, 391. Or in Missouri: Barnhart v. Campbell, 50 Mo. 597. And generally the deed of a part of the common property by metes and bounds, by one of several tenants, is voidable only by the co-tenants or some one of them, and is valid against all other persons: Nichols v. Smith, 22 Pick. 319. Compare Sutter v. San Francisco, 36 Cal. 115.

3 Porter v. Hill, 9 Mass. 34; Bartlet v. Harlow, 12 Mass. 348; Whilton v. Whilton, 38 N. H. 127.

4 Scott *v.* State, 1 Sneed, 629; and see Reed *v.* West, 16 Gray, 283.

5 Marks *v.* Sewall, 120 Mass. 174.

6 Primm *v.* Walker, 38 Mo. 74; and compare Butler *v.* Roys, 25 Mich. 53; 12 Am. Rep. 218; Nichols *v.* Smith, 22 Pick. 316; Hartford etc. Ore Co. *v.* Miller, 41 Conn. 112; Gates *v.* Salmon, 35 Cal. 576.

7 Butler *v.* Roys, 25 Mich. 53; 12 Am. Rep. 218.

8 Adams *v.* Frothingham, 3 Mass. 352; and see Barnum *v.* Landon, 24 Conn. 137.

§ 364. Estates in partnership.—An estate in partnership "is where real property is purchased and held by two or more partners, out of partnership funds, for partnership purposes."[1] Regarded independently of the rights of creditors, the legal title is in the several partners as tenants in common, and the estate has all the incidents of an estate in common.[2] But equity will regard such real estate as personal property, held in trust for the partnership, and the trust can be enforced by the interested parties, whether partners or creditors.[3] And the English decisions have even carried this doctrine to the extent that real estate purchased with partnership funds and for partnership purposes has for every purpose the quality of personal estate, and that the surplus, after a settlement of the partnership affairs, goes to the personal representative of a deceased partner, instead of his heirs.[4] The same doctrine prevails in some parts of the United States.[5] But the preponderance of American authority is to the effect that the real estate of a partnership is held as personalty for the purposes of the partnership,[6] but when not needed for such purposes, the legal title is released from all trusts, and the surplus descends as other real estate.[7] That is, if one partner dies, his heirs would receive the surplus that may remain after an adjustment of all the partnership affairs, the same as the deceased partner would have received it had he survived, and a dissolution had occurred.[8] Such surplus, which in fact is personal property, has the qualities and incidents of real estate, and would belong to the heirs, subject to the right of dower.[9] It is likewise subject to courtesy

and to partition.[10] One partner cannot convey the whole title to real estate, unless the whole title is vested in him,[11] though he may enter into an executory contract to convey which a court of equity will enforce.[12] And any one partner may sell his undivided share,[13] subject, however, to the equitable rights of the creditors.[14] And although one partner can convey the real estate of the partnership, if the legal title is vested in him, the purchaser takes it subject to the equitable rights of the other partners, provided he had knowledge or reasonable means of knowledge of the trust.[15] A lease of the real estate of the partnership by one partner in his own name inures to the benefit of the firm.[16]

1 1 Wash. Real Prop. 422; and see Smith v. Smith, 5 Ves. 189; Brownlee v. Allen, 21 Mo. 123; Coder v. Huling, 27 Pa. St. 84; Cox v. McBurney, 2 Sand. 561; Owens v. Collins, 23 Ala. 837.

2 Dyer v. Clark, 5 Met. 581; Howard v. Priest, 5 Met. 585; Tillinghast v. Chaplain, 4 R. I. 173; Goodburn v. Stevens, 5 Gill, 1; Gray v. Palmer, 9 Cal. 639; Collins v. Warren, 29 Miss. 236; Ludlow v. Cooper, 4 Ohio St. 1; Blake v. Nutter, 19 Me. 16. Compare Baird v. Baird, 1 Dev. & B. Eq. 524; 31 Am. Dec. 399; Price v. Hunt, 11 Ired. 42.

3 Buchan v. Sumner, 3 Barb. Ch. 165; Langs v. Waring, 25 Ala. 625; Cilley v. Huse, 40 N. H. 358; Davis v. Christian, 15 Gratt. 11; Fowler v. Bailey, 14 Wis. 125; Broom v. Broom, 3 Myine & K. 443; Houghton v. Houghton, 11 Sim. 491.

4 Bell v. Phyn, 7 Ves. 453; Essex v. Essex, 20 Beav. 442; and see Rice v. Barnard, 20 Vt. 479.

5 Pierce v. Trigg, 10 Leigh, 406; Dewey v. Dewey, 35 Vt. 555, White v. Fitzgerald, 19 Wis. 480; Bank of Louisville v. Hall, 8 Bush, 678; Thorn v. Thorn, 11 Iowa, 146; and see Chester v. Dickerson, 54 N. Y. 1; 13 Am. Rep. 550; Solomon v. Fitzgerald, 7 Heisk. 552; and see Shanks v. Klein, 104 U. S. 18.

6 Shearer v. Shearer, 98 Mass. 107; Melly v. Wood, 71 Pa. St. 488.

7 Rice v. Barnard, 20 Vt. 479; Shearer v. Shearer, 98 Mass. 107; Gray v. Palmer, 9 Cal. 639; Drewry v. Montgomery, 28 Ark. 256; Little v. Snedecor, 52 Ala. 167; Fairchild v. Fairchild, 64 N. Y. 471; Collins v. Warren, 29 Mo. 236; Scruggs v. Blair, 44 Miss. 406; Holland v. Fuller, 13 Ind. 195.

8 Shearer v. Shearer, 98 Mass. 107; Yeatman v. Woods, 6 Yerg. 20; 13 Am. Dec. 452; Williamson v. Fontain, 7 Baxt. 212.

9 Collins v. Warren, 29 Mo. 236; Dilworth v. Mayfield, 36 Miss. 40; Davis v. Christian, 15 Gratt. 11; Dyer v. Clark, 5 Met. 562. Compare McCauley v. Fulton, 44 Cal. 355; Murphy v. Abrams, 50 Ala. 293.

10 Buckley v. Buckley, 11 Barb. 43; Piper v. Smith, 1 Head, 93; Burnside v. Merrick, 4 Met. 537; Patterson v. Blake, 12 Ind. 436.

11 Van Brunt v. Applegate, 44 N. Y. 544; Chester v. Dickerson, 54 N. Y. 1; 13 Am. Rep. 550; Davis v. Christian, 15 Gratt. 11.

12 Chester v. Dickerson, 54 N. Y. 1; 13 Am. Rep. 550.

liability for the debts of her husband, and authorize her to devise and bequeath it, without changing the common-law rule as to the tenancy by entirety.[14]

1 Draper *v.* Jackson, 16 Mass. 480; Bolles *v.* Trust Co. 27 N. J. Eq. 308; Den *v.* Hardenbergh, 5 Halst. 42; 18 Am. Dec. 371; Doe *v.* Howland, 8 Cowen, 277; Stuckey *v.* Keefe, 26 Pa. St. 397; Taul *v.* Campbell, 7 Yerg. 319; Wales *v.* Coffin, 13 Allen, 213; Ward *v.* Krumm, 54 How. Pr. 95; Marburg *v.* Cole, 49 Md. 402; 33 Am. Rep. 266. If husband and wife succeed to an estate as heirs of the same person, they are tenants by entireties: Gillan *v.* Dixon, 65 Pa. St. 395. If a man and woman who are tenants in common marry, they will continue to hold as tenants in common: 1 Wash. Real Prop. 424; Moody *v.* Moody, Amb. 649; Ames *v.* Norman, 4 Sneed, 686; Den *v.* Hardenbergh, 10 N. J. L. 42; 18 Am. Dec. 371.

2 See Chandler *v.* Cheney, 37 Ind. 391; Taul *v.* Campbell, 7 Yerg. 333.

3 Arnold *v.* Arnold, 30 Ind. 305; Harding *v.* Springer, 14 Me. 407; Den *v.* Hardenbergh, 10 N. J. L. 42; 18 Am. Dec. 371; Hemingway *v.* Scales, 42 Miss. 1; 2 Am. Rep. 586; Fisher *v.* Provin, 25 Mich. 347; Farmers' Bank *v.* Gregory, 49 Barb. 155. In California husband and wife hold their homestead by a joint tenancy: Cal. Civ. Code, § 1265. See Barber *v.* Babel, 36 Cal. 16; Chase *v.* Abbott, 20 Iowa, 151.

4 Shaw *v.* Hearsey, 5 Mass. 521.

5 Ames *v.* Norman, 4 Sneed, 683. See Chandler *v.* Cheney, 37 Ind. 391; Brownson *v.* Hull, 5 Vt. 309; Bates *v.* Seely, 46 Pa. St. 248.

6 Hemingway *v.* Scales, 42 Miss. 1; 2 Am. Rep. 586; Arnold *v.* Arnold, 30 Ind. 305. A mortgage by the husband of land thus held, the wife not joining therein, is void: Chandler *v.* Cheney, 37 Ind. 391. So it is held that crops raised on land owned by husband and wife together cannot be sold on execution against the husband alone: Patton *v.* Rankin, 68 Ind. 245; 34 Am. Rep. 254; and see Marburg *v.* Cole, 49 Md. 402; 33 Am. Rep. 266; Montgomery *v.* Hickman, 62 Ind. 598.

7 Shaw *v.* Hearsey, 5 Mass. 521; Dias *v.* Glover, 1 Hoff. Ch. 71; Ross *v.* Garrison, 1 Dana, 35; Gibson *v.* Zimmerman, 12 Mo. 385; Green *v.* King, 2 Black. W. 121; Pollock *v.* Kelly, 6 I. R. C. L. 367.

8 Back *v.* Andrew, 2 Vern. 120; Anderson *v.* Tannehill, 42 Ind. 141; Hall *v.* Stephens, 65 Mo. 670; 27 Am. Rep. 302.

9 Back *v.* Andrew, 2 Vern. 120; and see Doe *v.* Wilson, 4 Barn. & Ald. 303; Chandler *v.* Cheney, 37 Ind. 401. In case of a devise to husband and wife, or to them with others, the husband's interest may be sold on execution, subject to the contingent survivorship of the wife: Hall *v.* Stephens, 65 Mo. 670; 27 Am. Rep. 302. Compare Hulett *v.* Inlow, 57 Ind. 412; 26 Am. Rep. 64.

10 Wilson *v.* Fleming, 13 Ohio, 68.

11 Benedict *v.* Galord, 11 Conn. 337. In Maryland a husband and wife may be made tenants in common or joint tenants according to the express terms of the grant: Fladung *v.* Rose, 58 Md. 13; 26 Alb. L. J. 478; and see Marburg *v.* Cole, 49 Md. 402; 33 Am. Rep. 266.

12 See Cooper *v.* Cooper, 76 Ill. 57; Hoffman *v.* Stigers, 28 Iowa, 302; Clark *v.* Clark, 56 N. H. 105; Meeker *v.* Wright, 76 N. Y. 262; Rev'g S. C. 11 Hun, 533. In the last-cited case it is held that where, since the passage of the act concerning the rights and liabilities of husband and wife (ch. 90, Laws of 1860), lands have been conveyed to a husband and wife jointly, without any statement in the deed as to the manner in which the grantees shall hold, they are tenants in common: see also Arnstett *v.* Arnstett, 3 Law Bull. 53. Compare Torry *v.* Torry, 14 N. Y. 430.

13 Marburg *v.* Cole, 49 Md. 402; 33 Am. Rep. 267; Diver *v.* Diver, 56 Pa. St. 106; Jones *v.* Chandler, 40 Ind. 588; McDuff *v.* Beauchamp, 50 Miss. 531; Garner *v.* Jones, 52 Mo. 68; McCurdy *v.* Canning, 64 Pa. St. 39; Bennett *v.* Child, 19 Wis. 365; Hulett *v.* Inlow, 57 Ind. 412; 26 Am. Rep. 64; and see in re Shaver, 31 Up. Can. Q. B. 605.

14 Robinson *v.* Eagle, 29 Ark. 202; Diver *v.* Diver, 56 Pa. St. 106.

§ 367. Partition.—The allotment to each of two or more joint owners of real property, of his share in severalty, is called partition.[1] At common law no owner of any joint estate, parceners excepted, could compel his companion to make partition.[2] But the writ of partition was given by statutes 31 Hen. 8, c. 1, and 32 Hen. 8, c. 32, by means of which joint tenants were enabled to compel a partition of their estates;[3] and such continued to be one of the modes of partition in England until the writ of partition was abolished by statutes 3 & 4 Wm. 4, c. 27.[4] By the provisions of the latter statute the process of partition has been greatly simplified.[5] In this country the mode of enforcing partition is made the subject of statutory regulation in the several States, and it will be found to be substantially the same in relation to joint tenants and tenants in common.[6] Courts of equity assumed jurisdiction in cases of partition at a very early period,[7] and the partition of incorporeal hereditaments is especially a subject of equitable jurisdiction.[8] But generally speaking, in order to obtain partition in equity, it is necessary for the legal title to be clear and undisputed.[9] Proceedings in partition are *in rem*;[10] and, like real actions, are generally local.[11]

1 2 Bouv. Inst. 410, 411; 2 Blackst. Com. 323; 1 Greenl. Cruise, 863; and see Weiser *v.* Weiser, 5 Watts, 279. See as to voluntary partition Freem. Cotenancy and Partition, §§ 393, 394.

2 See Co. Litt. 175 *a*; 1 Wash. Real Prop. 426; Coles *v.* Wooding, 1 Pat. & H. 197; Venable *v.* Beauchamp, 3 Dana, 321; 28 Am. Dec. 78.

3 See Story Eq. Jur. § 646; 2 Blackst. Com. 323.

4 4 Kent Com. 364; Cook *v.* Allen, 2 Mass. 469; M'Kee *v.* Straub, 2 Binn. 1.

5 See Cook *v.* Allen, 2 Mass. 469; Baxter *v.* Knowles, 1 Ves. Sr. 494. Late English partition acts are the statutes 31 & 32 Vict. c. 40; 39 & 40 Vict. c. 17; and see Rawlinson *v.* Miller, Law R. 1 Ch. Div. 52; 15 Eng. Rep. 644; In re Frith and Osborne, Law R. 3 Ch. Div. 618; 18 Eng. Rep. 724; Porter *v.* Lopes, Law R. 7 Ch. Div. 358; 23 Eng. Rep. 631; Gilbert *v.*

Smith, Law R. 8 Ch. Div. 548; 25 Eng. Rep. 465; Crookes *v.* Whitworth, Law R. 10 Ch. Div. 289; Gilbert *v.* Smith, Law R. 11 Ch. Div. 78; 27 Eng. Rep. 349.

6 See N. Y. Code Civ. Proc. § 1532, *et seq.*; Potter *v.* Wheeler, 13 Mass. 504; Adam *v.* Ames Iron Co. 24 Conn. 240; Brownell *v.* Brownell, 19 Wend. 367; Whitten *v.* Whitten, 36 N. H. 326; Griffin *v.* Griffin, 33 Ga. 107; Bollo *v.* Navarro, 33 Cal. 459; Ledbetter *v.* Gash, 8 Ired. 462; Platt *v.* Stewart, 10 Mich. 260. A parol partition carried into effect by possession and occupation, in conformity thereto, will be binding between tenants in common whose titles are distinct, and the only object of the division is to ascertain the separate possessions: Mount *v.* Merton, 20 Barb. 128; Rider *v.* Maul, 46 Pa. St. 376; Shepard *v.* Rinks, 78 Ill. 188; Buzzell *v.* Gallagher, 28 Wis. 678. And this is so, although they are *femes covert*, or minors, if the partition is made with the acquiescence of their husbands or guardians: McConnell *v.* Carey, 48 Pa. St. 345. See Dement *v.* Williams, 44 Tex. 158.

7 See Story Eq. Jur. § 646; Baxter *v.* Knowles, 1 Ves. Sr. 494; Smith *v.* Smith, 10 Paige, 470; Bailey *v.* Sisson, 1 R. I. 233; Greenup *v.* Sewell, 18 Ill. 53; Kennedy *v.* Kennedy, 43 Pa. St. 413; Hartshorne *v.* Hartshorne, 2 N. J. Eq. 349; Whitten *v.* Whitten, 36 N. H. 332.

8 Bailey *v.* Sisson, 1 R. I. 233.

9 Whillock *v.* Hale, 10 Humph. 64; Albergottie *v.* Chaplin, 10 Rich. Eq. 428; Shearer *v.* Winston, 33 Miss. 149; Maxwell *v.* Maxwell, 8 Ired. Eq. 25. Compare Miller *v.* Chittenden, 2 Iowa, 315; Haggin *v.* Haggin, 2 Mon. B. 317; Hosford *v.* Merwin, 5 Barb. 51; Hay *v.* Estell, 18 N. J. Eq. 251.

10 Corwithe *v.* Griffing, 21 Barb. 9.

11 Brown *v.* McMullen, 1 Nott & McC. 252; Bonner, Petitioner, 4 Mass. 122. See Platt *v.* Stewart, 10 Mich. 260.

§ 368. Who may have partition.—Tenants in common are entitled to a partition of the land held in common,[1] however inconvenient or injurious it may be to make it.[2] Or if a partition cannot be made, they are entitled to a sale and division of the proceeds.[3] But proceedings for partition ordinarily lie only in favor of one who has a seizin of the premises;[4] consequently tenants in common of a reversion or remainder cannot apply for partition without the concurrence of the owners of the present estate.[5] It is however held, that a constructive seizin is sufficient, unless there is proof of an ouster.[6] If a party be disseized, his mere right of entry is not sufficient to entitle him to partition.[7] The heirs of a deceased person, or their grantees, are the proper parties to proceedings for the partition of the real estate of the deceased.[8] But partition will not lie between living heirs and one *in ventre sa mere*.[9] And heirs are not entitled to

partition among themselves while the lien of the administrator, for the payment of the intestate's debts, remains upon the land.[10] The grantee of the widow's right of dower in the land may maintain a suit for partition;[11] and a tenant by the courtesy initiate may have partition.[12] So may the owners of an equity of redemption before entry by the mortgagee and possession taken under his mortgage.[13] And the guardian of a minor who is a tenant in common with adults may have partition.[14] One who purchases the interest of a devisee of real estate may have partition, the same as his vendor.[15] And a partner may have partition of partnership land.[16] In a suit for partition by the committee of a lunatic or habitual drunkard, the lunatic or drunkard should be joined as plaintiff.[17] One having a mere equitable title may apply to the court for partition.[18]

1 Smith *v.* Smith, 10 Paige, 470; Scovil *v.* Kennedy, 14 Conn. 349; Campbell *v.* Lowe, 9 Md. 500. But see Danvers *v.* Dorrity, 14 Abb. Pr. 206. The right to partition is likewise incident to an ownership in joint tenancy, as well as to estates in common: Holmes *v.* Holmes, 2 Jones Eq. 334; Higginbottom *v.* Short, 25 Miss. 160; Hanbury *v.* Hussey, 15 Jur. 536; 5 Eng. Law & Eq. 81. To maintain a partition action, the plaintiff must be either joint tenant or tenant in common in possession with the other parties to the suit of all lands intended to be divided: Manolt *v.* Brush, 19 N. Y. Daily Reg. No. 137; S. C. 3 Law Bull. 66; and see Thomas *v.* Garvan, 4 Dev. 223; Clapp *v.* Bramaghan, 9 Cowen, 530; Matter of Prentiss, 7 Ohio, 129; 30 Am. Dec. 203; McConnell *v.* Kibbe, 43 Ill. 12.

2 Hanson *v.* Willard, 12 Me. 142; 28 Am. Dec. 162; Witherspoon *v.* Dunlap, Harp. 380; Ledbetter *v.* Gash, 8 Ired. 462.

3 Potter *v.* Wheeler, 13 Mass. 504; Lucas *v.* Peters, 45 Ind. 313; Gregory *v.* Gregory, 69 N. C. 522; Bradshaw *v.* Callaghan, 8 Johns. 558; Royston *v.* Royston, 13 Ga. 425.

4 Brownell *v.* Brownell, 19 Wend. 367; Burhans *v.* Burhans, 2 Barb. Ch. 398; Adam *v.* Ames Iron Co. 24 Conn. 230; Stevens *v.* Enders, 13 N. J. 271; Whitten *v.* Whitten, 36 N. H. 326. Partition can only be maintained by some one having an estate or interest in the lands, and not by a *cestui que trust:* Harris *v.* Larkins, 22 Hun, 488; Stryker *v.* Lynch, 11 N. Y. Leg. Obs. 116.

5 Striker *v.* Mott, 2 Paige, 387; 22 Am. Dec. 646; Brown *v.* Brown, 8 N. H. 93; Tabler *v.* Wiseman, 2 Ohio St. 207; Nichols *v.* Nichols, 28 Vt. 228; Hughes *v.* Hughes, 63 How. Pr. 408; 11 Abb. N. C. 37. Compare Blakely *v.* Colder, 15 N. Y. 617; Morse *v.* Morse, 85 N. Y. 57; Brevoort *v.* Brevoort, 70 N. Y. 136.

6 Barnard *v.* Pope, 14 Mass. 434; 7 Am. Dec. 225; Rozier *v.* Johnson, 35 Mo. 326. Compare Wommack *v.* Whitmore, 58 Mo. 448; Van Schuyver *v.* Mufford, 50 N. Y. 430.

7 Brock *v.* Eastman, 28 Vt. 658. That partition lies for one having a present right of entry: see Tabler *v.* Wiseman, 2 Ohio St. 207; Marshall *v.* Crehore, 13 Met. 462.

8 Van Derwerker *v.* Van Derwerker, 7 Barb. 221.

9 Gillespie *v.* Nabors, 59 Ala. 441; 31 Am. Rep. 20.

10 Hubbard *v.* Ricart, 3 Vt. 207; 23 Am. Dec. 198.

11 Morgan *v.* Staley, 11 Ohio, 389. A tenant in dower has no right to demand partition: Coles *v.* Coles, 15 Johns. 320.

12 Otley *v.* McAlpine, 2 Gratt. 343; Riker *v.* Darke, 4 Edw. Ch. 668. Tenants for life in possession may have partition as between themselves: Jenkins *v.* Fahey, 73 N. Y. 355.

13 Upham *v.* Bradley, 17 Me. 423; Call *v.* Barker, 12 Me. 320; Colton *v.* Smith, 11 Pick. 311; and see Bradley *v.* Fuller, 23 Pick. 1.

14 Zirkle *v.* McCue, 26 Gratt. 517; and compare Galleo *v.* Eagle, 65 Barb. 583; S. C. 1 Thomp. & C. 124; Thornton *v.* Thornton, 27 Mo. 302; Mitchell *v.* Jones, 50 Mo. 438; Shull *v.* Kennon, 12 Ind. 35.

15 De Castro *v.* Barry, 18 Cal. 96; Stewart's Appeal, 56 Pa. St. 241; and see Collamer *v.* Hutchins, 27 Vt. 734; King *v.* Howard, 27 Mo. 21.

16 Collins *v.* Dickinson, 1 Hayw. 240; Hughes *v.* Devlin, 23 Cal. 501; Canfield *v.* Ford, 28 Barb. 336; Danvers *v.* Dorrity, 14 Abb. Pr. 208; Jackson *v.* Deese, 35 Ga. 88. But see Darby *v.* Darby, 3 Drew. 501; Wild *v.* Milne, 26 Beav. 504.

17 Gorham *v.* Gorham, 3 Barb. Ch. 24; and see Snowden *v.* Dunlavey, 11 Pa. St. 522; Matter of Latham, 6 Ired. Eq. 406.

18 Willing *v.* Brown, 7 Serg. & R. 467; Welch *v.* Anderson, 28 Mo. 293. Compare Coale *v.* Barney, 1 Gill & J. 341; Hopkins *v.* Toel, 4 Humph. 46.

§ 369. Parties defendant in partition.—All persons interested in the real property sought to be divided should be made parties to the proceedings for partition, either as plaintiffs or defendants;[1] otherwise, they will not be bound by the judgment or decree.[2] Persons who hold encumbrances upon the separate undivided shares need not be made parties.[3] So, before assignment of dower, the widow need not be made a party to an action for the partition of the estate in which she claims dower.[4] Where a wife seeks the partition of her separate estate, the husband should be made a party defendant.[5] And the wife of a tenant in common may be made defendant in an action by him for partition.[6]

1 Bogardus *v.* Parker, 7 How. Pr. 305; Harlan *v.* Stout, 22 Ind. 488; Candy *v.* Stradley, 1 Del. Ch. 113; Knapp *v.* Hungerford, 7 Hun, 588; Kester *v.* Stark, 19 Ill. 328; Newby *v.* Perkins, 1 Dana, 440; 25 Am. Dec. 160; Harman *v.* Kelley, 14 Ohio, 502; Braker *v.* Devereux, 8 Paige, 513; Sullivan *v.* Sullivan, 60 N. Y. 37; Barney *v.* Baltimore, 6 Wall. 280; Lancaster *v.* Seay, 6 Rich. Eq. 111. At common law, the non-joinder of a defendent in an action for partitition is matter of abatement only: Hoxsie *v.* Ellis, 4 R. I. 123.

2 Cook *v.* Allen, 2 Mass. 462; Harlan *v.* Stout, 22 Ind. 488; Munroe *v.* Luke, 19 Pick. 39. Compare Foxcroft *v.* Barnes, 29 Me. 128; Purvis *v.* Wilson, 5 Jones, (N. C.) 22.

3 Baring *v.* Nash, 1 Ves. & B. 551; Sebring *v.* Mesereau, 9 Cowen, 344; Long's Appeal, 77 Pa. St. 151; Thurston *v.* Minke, 32 Md. 574; Low *v.* Holmes, 17 N. J. Eq. 148; Townshend *v.* Townshend, 1 Abb. N. C. 81. But compare Lewis *v.* Atkinson, 15 Iowa, 361.

4 Power *v.* Power, 7 Watts, 205; Gordon *v.* Sterling, 13 How. Pr. 405; Tanner *v.* Niles, 1 Barb. 560. Compare Green *v.* Putnam, 1 Barb. 500.

5 Brownson *v.* Gifford, 8 How. Pr. 389. See Disbrow *v.* Folger, 5 Abb. Pr. 54; Doe *v.* Prettyman, 1 Houst. 334.

6 Rosekrans *v.* White, 7 Lans. 486.

§ 370. Judgment or decree in partition.—The judgment or decree awarding partition must set forth the estate and interest of each party,[1] and point out the manner in which the partition shall be made.[2] And a simple order that "partition be awarded" is void.[3] If the estate consists of distinct kinds of property, a part of each kind should be assigned in severalty, if this can be done without impairing the value of the estate.[4] If the common estate consists of several parcels, the entire share of one tenant in common applying for partition may be set off if practicable, leaving the residue undivided.[5] It is held that there may be a partition of standing timber;[6] so of a mill and mill privilege.[7] But a saw-mill, mill-yard, mill-pond, and the utensils of the mill, are held not to be proper subjects of partition.[8] So the partition of land valuable chiefly as ore-bed was denied.[9] Upon a partition of land improvements should, together with the lands on which they are erected, be set aside to the co-tenant who erected them,[10] and without making any allowance against him for the increase in value occasioned by his improvements.[11] Nor is it any objection to an allowance for improvements that they were made by tenants in common in reversion, during the continuance of a previous life estate.[12] Where the bill for partition prays for general relief, the decree may direct an account of the rents and profits.[13] If the land cannot be properly divided, and a sale is necessary, the Court may adjust and secure the rights of the parties in the proceeds of the sale, whether such rights be legal or equitable.[14] A judgment

of partition establishes the title and concludes the parties.[15] It is equivalent to an ordinary conveyance,[16] and is notice to purchasers of the land embraced in the shares.[17] It cannot be attacked collaterally;[18] but a decree of partition bad in part is bad as to the whole.[19]

1 Ledbetter *v.* Gash, 8 Ired. 462; Kilgour *v.* Crawford, 51 Ill. 249.

2 Harrell *v.* Harrell, 12 La. An. 549; Young *v.* Frost, 1 Md. 377.

3 Greenup *v.* Sewell, 18 Ill. 53; and see Tibbs *v.* Allen, 27 Ill. 119.

4 Hay *v.* Estell, 19 N. J. Eq. 133.

5 Gordon *v.* Pearson, 1 Mass. 323; Hagar *v.* Wiswall, 10 Pick. 152; Shull *v.* Kennon, 12 Ind. 34; Abbott *v.* Berry, 46 N. H. 369.

6 Steedman *v.* Weeks, 2 Strob. Eq. 145.

7 Hansen *v.* Willard, 12 Me. 142; 28 Am. Dec. 162; and compare Hills *v.* Dey, 14 Wend. 204; Morrill *v.* Morrill, 5 N. H. 134; Bailey *v.* Rust, 15 Me. 440; Munroe *v.* Gates, 42 Me. 178.

8 Brown *v.* Turner, 1 Aiken, 67; 15 Am. Dec. 669.

9 Conant *v.* Smith, 1 Aiken, 67; 15 Am. Dec. 669; and see Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394.

10 Nelson *v.* Clay, 7 Marsh. J. J. 138; 23 Am. Dec. 387; Seale *v.* Soto, 35 Cal. 102; and see Patrick *v.* Marshall, 2 Bibb, 40; 4 Am. Dec. 670.

11 Nelson *v.* Clay, 7 Marsh. J. J. 138; 23 Am. Dec. 387.

12 Hall *v.* Piddock, 21 N. J. Eq. 311.

13 Humphrey *v.* Foster, 13 Gratt. 653.

14 Gregory *v.* Gregory, 69 N. C. 522; Milligan *v.* Poole, 35 Ind. 64. See Prentice *v.* Janssen, 79 N. Y. 478.

15 Mills *v.* Witherington, 2 Dev. & B. 434; Colton *v.* Smith, 11 Pick. 311; 22 Am. Dec. 375; Jenkins *v.* Fahey, 73 N. Y. 355.

16 Anderson *v.* Hughes, 5 Strob. 74.

17 Richards *v.* Rote, 68 Pa. St. 253; Wilson *v.* Smith, 22 Gratt. 493; Marshall *v.* McLean, 3 Greene, 363. The judgment determines the right of possession, but does not vest in either of the parties any new or additional title in the share set off to each: Wade *v.* Deray, 50 Cal. 376; Pierce *v.* Oliver, 13 Mass. 211. A deed of partition does not affect the title of the parties, but only fixes the boundaries: Goundie *v.* Northampton etc. 7 Pa. St. 233.

18 Wright *v.* Marsh, 2 Greene, 94; Merklein *v.* Trapnell, 34 Pa. St. 42.

19 Corwithe *v.* Griffing, 21 Barb. 9.

§ 371. Warranty in partition deeds.—Where partition has been made by law, each partitioner becomes the warrantor of the other to the extent of the portion allotted to him, whether there be an express warranty in the deed or not.[1] And since a warrantor is barred or estopped to claim against his own warranty,[2] it follows that no party to a partition can be permitted to assert an adverse title for the purpose of ousting another party

from his portion allotted to him by the same partition.[3] A tenant in common is not permitted, even after partition made, to purchase in a superior outstanding claim for his own exclusive benefit, and much less to use it for the expulsion of his co-tenant.[4] Such a purchase is considered in equity as inuring to the benefit of all the co-tenants, though the purchaser is entitled to contribution.[5]

1 Walker *v.* Hall, 15 Ohio St. 362; Venable *v.* Beauchamp, 3 Dana, 321; 28 Am. Dec. 74. Warranty of title is implied in partition deed between tenants in common taking by descent in Pennsylvania: Patterson *v.* Lanning, 10 Watts, 135; 36 Am. Dec. 154; and see Seaton *v.* Barry, 4 Watts & S. 185.

2 See § 317. *ante.*

3 Venable *v.* Beauchamp, 3 Dana, 321; 28 Am. Dec. 74.

4 Venable *v.* Beauchamp, 3 Dana, 321; 28 Am. Dec. 74; Davis *v.* King, 87 Pa. St. 261; Swinburne *v.* Swinburne, 28 N. Y. 568; Titsworth *v.* Stout, 49 Ill. 78; Funk *v.* Newcomer, 10 Md. 301.

5 Sneed *v.* Atherton, 6 Dana, 276; 32 Am. Dec. 70; Rothwell *v.* Dewees, 2 Black, 613; Mandeville *v.* Solomon, 39 Cal. 125. Compare Dubois *v.* Campan, 24 Mich. 300; Buchanan *v.* King, 22 Gratt. 414; Flinn *v.* McKinley, 44 Iowa, 68; Bracken *v.* Cooper, 80 Ill. 221.

CHAPTER XXVII.

SALE AND PURCHASE OF LANDS.

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§ 372. Nature of contract.—Contracts for the purchase and sale of land are in their nature executory,[1] not vesting any present title;[2] and herein they are distinguished from actual executed conveyances of the land passing title.[3] And whether an agreement for the sale of land is a present conveyance passing title, or is merely executory, is a question to be determined from the intention of the parties, as collected from the whole instrument.[4] But, as a general rule, the acceptance of a deed in pursuance of the terms of a contract for the sale of land is *prima facie* an execution of the contract, which thereby becomes void and of no further effect.[5] So, in equity, contracts for the sale of land are treated as if they had been executed.[6] The purchaser is regarded as owner of the land, and the vendor as owner of the purchase-money, and as seized in trust for the purchaser;[7] and the trust attaches to the land so as to bind every one claiming through the vendor with notice.[8] But at law, a mere equitable title is not regarded, and is unavailing for a recovery or defense against the legal title.[9]

1 Stewart *v.* Lang, 37 Pa. St. 201; Atwood *v.* Cobb, 16 Pick. 227; Bull *v.* Willard, 9 Barb. 641; Bennett *v.* Fuller, 29 La. An. 663.

2 Stewart *v.* Lang, 37 Pa. St. 201; Willey *v.* Day, 51 Pa. St. 51.

3 Lau *v.* Mumma, 43 Pa. St. 267; Bull *v.* Willard, 9 Barb. 641.

4 Borts *v.* Bortz, 48 Pa. St. 382; Shirley *v.* Shirley, 59 Pa. St. 267.

5 Bull *v.* Willard, 9 Barb. 641; Houghtailing *v.* Lewis, 10 Johns. 297; Bryan *v.* Swain, 56 Cal. 616; Davenport *v.* Whisler, 46 Iowa, 287.

6 Linscott *v.* Buck, 33 Me. 530; Bodley *v.* Ferguson, 30 Cal. 511; King *v.* Ruckman, 21 N. J. Eq. 599; Reed *v.* Lukens, 44 Pa. St. 200; Slter's Appeal, 26 Pa. St. 186; Lombard *v.* Chicago etc. Cong. 64 Ill. 481.

7 Linscott *v.* Buck, 33 Me. 530; Cary *v.* Whitney, 48 Me. 516; Morgan *v.* Scott, 26 Pa. St. 51; Baldwin *v.* Pool, 74 Ill. 97; Den *v.* Dellinger, 75 N. C. 300. One who has given bond to convey becomes, in equity, a trustee for the purchaser: Swepson *v.* Rouse, 65 N. C. 34.

8 Reed *v.* Lukens, 44 Pa. St. 200; McKechnie *v.* Sterling, 48 Barb. 334; Townsend *v.* Bissell, 4 Hun. 300.

9 Brill *v.* Stiles, 35 Ill. 305.

§ 373. What constitutes the contract.—A contract for the purchase and sale of land requires a concurrence of will on the part of both vendor and purchaser.[1] And a mere offer by the vendor to sell, unless it be unqualifiedly accepted by the purchaser according to its terms, imposes no obligation, and will not be specifically enforced.[2] Thus, if A signs a writing, declaring that he will sell to B his house, etc., at a certain price, etc., this is a mere proposition, and not a contract.[3] But if the purchaser accepts the proposition of the vendor, and pays money to bind the bargain, the contract thereby becomes complete, and the vendor cannot afterward impose new terms or conditions;[4] and if he refuses to convey, a specific performance of the contract will be enforced against him and a subsequent purchaser with notice.[5] So, a contract for the sale of land may be the result of a correspondence by letters.[6] And where A proposed by letter to sell land to B, and B answered, accepting on the terms proposed, the sale was held to be complete the moment that B's letter of acceptance was mailed.[7] And if the letters be written by the agents of the respective parties, it is sufficient.[8] But where letters are stated as the agreement for the purchase and sale of land, no testimony *aliunde* is admissible;[9] but it is otherwise where stated as evidence of the agreement only.[10]

1 Erwin *v.* Bank of Kentucky, 5 La. An. 1; Eliason *v.* Henshaw, 4 Wheat. 228; Vicksburg etc. R. R. Co. *v.* Hamilton, 15 La. An. 521; and see Kyle *v.* Kavanagh, 103 Mass. 355; 4 Am. Rep. 560.

2 Holland *v.* Eyre, 2 Sim. & St. 194; Huddleston *v.* Briscoe, 11 Ves.

863; Barrow v. Ker, 10 La. An. 129; Cammeyer v. United German Lutheran Churches, 2 Sand. Ch. 186.

3 Tucker v. Woods, 12 Johns. 190; and see Burns v. Allen, 11 Ired. 25.

4 Keegan v. Williams, 22 Iowa, 378; and see Doyle v. Teas, 5 Ill. 202.

5 Keegan v. Williams, 22 Iowa, 378.

6 Dunlop v. Higgins, 1 H. L. Cas. 381; Holland v. Eyre, 2 Sim. & St. 194; New York etc. R. R. Co. v. Pixley, 19 Barb. 423. Compare Dodge v. Lean, 13 Johns. 5-8; Gartrell v. Stafford, 12 Neb. 545.

7 Moore v. Pierson, 6 Iowa, 279. But where a letter is addressed to another, inquiring if he is the owner of certain real estate and the price thereof, to which he responds, stating the price at which he holds it, such response will not be construed as a proposition of sale: Knight v. Cooley, 24 Iowa, 218.

8 Cowley v. Watts, 17 Jur. 172; 17 Eng. L. & Eq. 147.

9 Birce v. Bletchley, 6 Madd. 17. Compare Huddleston v. Briscoe, 11 Ves. 583.

10 Birce v. Bletchley, 6 Madd. 17.

§ 374. Parties to contract.—Competent existing parties constitute one of the essential features of a contract for the purchase and sale of land, and where there is nothing in the instrument itself nor in the nature of the transaction which shows who are the parties, the contract is to be deemed void for uncertainty.[1] But the parties need not be expressly named,[2] nor is it essential in every case that the party to whom final conveyance is to be made should, at the time, be distinctly ascertained.[3] Thus, a bond for the conveyance of lands to a board not *in esse*, given for a proper consideration, was held not to be void for the want of a grantee.[4] The heirs of a vendor, whether adult or infant,[5] and although not named in the contract, are bound to fulfill the contract to the extent of the estate that descends to them.[6] And where a vendor dies before performance of the contract, leaving an only child as his heir at law, who is a lunatic, equity may decree a specific performance of the contract, and may direct the committee of the lunatic to execute all necessary conveyances for the purpose.[7] If the vendee assign the contract, and his assignee takes possession, the vendor, though he cannot compel the assignee to pay the purchase-money, may, by virtue of his lien on the land, call on him to pay the money, or to surrender the possession of the

land, or to have it sold for the benefit of the vendor.[8] At common law, an agreement by a married woman for the sale of her land is void, even if entered into with the assent of her husband;[9] and such agreement will not be enforced against her in equity.[10] As a general rule, she can bind her interest in lands only in the precise mode prescribed by law.[11] But the husband can give a lease for a term of years of lands owned in fee by the wife, which will be valid during the coverture at least,[12] and an agreement to give such a lease, if otherwise unobjectionable, may be enforced in equity.[13] In Massachusetts it is held that an agreement by a husband to convey land with a release of his wife's dower and homestead may be enforced against him so far as he has power to execute it, with compensation in damages if the wife refuses to join.[14] A verbal authority to an agent to make a contract relative to the sale of lands is held to be valid, and not within the Statute of Frauds.[15] But the execution of a deed by an agent will not be valid unless authorized by an instrument under seal, or done in the actual presence of the principal.[16] And where a power of attorney to convey lands has been given, verbal directions to the agent can confer no new authority, nor enlarge that contained in the power.[17]

1 Webster *v.* Ela, 5 N. H. 540.

2 Green *v.* Davies, 4 Barn. & C. 235; Brown *v.* Gilman, 13 Mass. 158; Webster *v.* Ela, 5 N. H. 540.

3 Hill. Vendors, 51.

4 Sargeant *v.* State Bank of Indiana, 12 How. 371; and see § 290, *ante*.

5 Sutphen *v.* Fowler, 9 Paige, 280.

6 Hill *v.* Ressegieu, 17 Barb. 162.

7 Swartwout *v.* Burr, 1 Barb. 495.

8 Champion *v.* Brown, 6 Johns. Ch. 398. The assignee of a contract for the purchase of land takes it subject to its infirmities, and acquires no greater rights than the assignor had: Parmly *v.* Buckley, 103 Ill. 115.

9 Butler *v.* Buckingham, 5 Day, 492.

10 Butler *v.* Buckingham, 5 Day, 492; and see Aylett *v.* Ashton, 1 Mylne & C. 105. Equity will not decree a specific performance of a contract by husband and wife to sell her land, as against her: Clarke *v.* Reins, 12 Gratt. 98.

11 Dunlap *v.* Mitchell, 10 Ohio, 117; Bressler *v.* Kent, 61 Ill. 426; 14 Am. Rep. 67; and see § 283. *ante*.

12 Eaton *v.* Whitaker, 18 Conn. 222.

13 Eaton *v.* Whitaker, 18 Conn. 222.

14 Park *v.* Johnson, 4 Allen, 259; Davis *v.* Parker, 14 Allen, 94. A husband agreed to sell land, but the wife, without collusion with him, refused to join in the deed. It was held that the vendee could not compel a specific performance by the husband alone, and retain part of the purchase-money as indemnity against the wife's contingent claim of dower: Burk's Appeal, 75 Pa. St. 141; 15 Am. Rep. 587. In an action for a breach of the contract it was held that compensatory damages only were recoverable: Burk *v.* Serrill, 80 Pa. St. 413; 21 Am. Rep. 105.

15 Johnson *v.* M'Gruder, 15 Mo. 365; Ledbetter *v.* Walker, 29 Ala. 176; Marston *v.* Roe, 8 Ad. & E. 15; Coleman *v.* Grrigues, 18 Barb. 60. But compare Vanhorn *v.* Frick, 6 Serg. & R. 90.

16 Kime *v.* Brooks, 9 Ired. 218; and see § 294, *ante*.

17 Spofford *v.* Hobbs, 29 Me. 148.

§ 375. Consideration.—One of the elements of a contract for the purchase and sale of land is some valuable consideration, without which the contract cannot in general stand.[1] But it is not necessary that the consideration should be a cash payment.[2] Thus, a note given for the purchase-money will be deemed a sufficient consideration for a bond to convey.[3] So the possession of lands is an adequate consideration to support a promise to pay the price therefor.[4] A covenant that the grantee would support the grantor during life is a valuable consideration.[5] So a vendor's promise to indemnify the vendee for his improvements, if the title warranted fails, is founded on sufficient consideration, and will support assumpsit.[6] And a covenant by the vendee to erect a brick building upon the land within a certain time is held to be a valid consideration for the covenant to sell.[7] But the owner of land is under no obligation to pay for work or labor done upon it by one who has entered without his consent or any color of right, and held possession against him, and a promise thus to pay is without consideration and void.[8]

1 Gorham *v.* Herrick, 2 Me. 87; Burling *v.* King, 66 Barb. 633; Dorsey *v.* Packwood, 12 How. 126; Andriot *v.* Lawrence, 33 Barb. 142; Greene *v.* Allen, 32 Ala. 215; Smith *v.* Ware, 13 Johns. 257; and see § 292, *ante*.

2 Pierce *v.* Woodward, 6 Pick. 206; Whiteside *v.* Jennings, 19 Ala. 784. Mutual promises to convey constitute a sufficient consideration: Murphy *v.* Rooney, 45 Cal. 78; and see Curlin *v.* Hendricks, 35 Tex. 225.

3 Whiteside *v.* Jennings, 19 Ala. 784; and see Eldridge *v.* Turner, 10 Ala. 1049; Doyle *v.* Teas, 5 Ill. 202. The consideration for a contract to sell land may be valid, although the vendee does not expressly stipulate to buy or pay for the land: Eno *v.* Woodworth, 4 N. Y. 249. But an offer to sell land at a certain price is an offer to sell for cash, and the acceptance of such offer must be absolute, and not qualified or limited by conditions: Cammeyer *v.* United German Churches, 2 Sand. Ch. 186; and see Maynard *v.* Tabor, 53 Me. 511; Sennett *v.* Shehan, 27 Minn. 328.

4 Parker *v.* Crane, 6 Wend. 647; Hart *v.* Young, 1 Lans. 419; and see Lorentz *v.* Lorentz, 14 W. Va. 761.

5 Stewart *v.* Redditt, 3 Md. 67; and see Watson *v.* Smith, 7 Oreg. 448; Hyatt *v.* Williams, 72 Mo. 214.

6 Richardson *v.* Gosser, 26 Pa. St. 336.

7 Brewer *v.* Bessinger, 25 Miss. 86.

8 Frear *v.* Hardenbergh, 5 Johns. 272; and see McFarland *v.* Mathis, 10 Ark. (5 Eng.) 560. Specific performance may be decreed in favor of a purchaser, though the whole consideration be not stated in the contract, if he is willing to pay the whole: Park *v.* Johnson, 4 Allen, 259.

§ 376. Auction sales.—Lands are frequently disposed of at auction, which is a public sale of property to the highest bidder.[1] The person who conducts the sale is called an auctioneer, and the auction may be by public outcry or otherwise.[2] It is not necessary that a person should be present at an auction to become a purchaser, but he may make his bid by letter.[3] A mere verbal authority sufficiently authorizes an agent to act as auctioneer and to sell lands, but not to make a deed of them.[4] Nor can an auctioneer delegate his authority to sell to another;[5] but he may employ another to use the hammer and make the outcry under his immediate direction and supervision;[6] and he may employ all necessary and proper assistants.[7] As soon as a sale is perfected the agency of the auctioneer ceases.[8] And in no case can he, under his authority as auctioneer, negotiate a private sale after failure at an auction sale.[9] A sale at auction is within the provisions of the Statute of Frauds, and requires a memorandum in writing in order to bind both parties to the contract.[10] But this memorandum, duly made and signed by the auctioneer, is sufficient.[11] He acts as the agent of the purchaser as well as that of the vendor.[12] But the memorandum must be made and signed by the auctioneer at the time of the sale, and before the termi-

nation of the proceedings, or the purchaser will not be bound.[13] And an auctioneer who is himself the vendor and party in interest has no authority to sign a memorandum to take the sale out of the statute.[14] As a general rule, the employment of puffers or by-bidders for the purpose of running up the property by fictitious bids is deemed against public policy, and avoids an auction sale.[15] The buyer at such a sale may be relieved from his purchase;[16] unless, after knowledge of the facts, he took possession and allowed a confirmation of the sale;[17] or unless the price was not exorbitant, and there had been a long acquiescence by the buyer.[18] So if persons be employed to bid up to a certain sum in order to avoid a sacrifice of the property, and the price is afterward raised by real bidders, the sale will be sustained.[19] And merely to employ a person to "bid in" for the owner does not necessarily vitiate an auction sale, if the price is not intended to be thereby enhanced beyond a fair value;[20] and whether the by-bidder is employed in good faith to prevent a sacrifice, or simply to enhance the price by a pretended competition, is held to be a question for the jury.[21] Lands may be leased as well as sold at auction.[22]

1 See Walker *v.* Advocate-General, 1 Dow, 114.

2 State *v.* Conkling, 19 Cal. 501; State *v.* Rucker, 24 Mo. 557; Hunt *v.* Philadelphia, 35 Pa. St. 277; Walker *v.* Advocate-General, 1 Dow, 115, 116. See Crandall *v.* State, 28 Ohio St. 479.

3 Tyree *v.* Williams, 3 Bibb, 368; 6 Am. Dec. 663; compare Minturn *v.* Allen, 3 Sand. 50.

4 Yourt *v.* Hopkins, 24 Ill. 326.

5 Stone *v.* State, 12 Mo. 400.

6 Commonwealth *v.* Harnden, 19 Pick. 482; and see Poree *v.* Bonneval, 6 La. An. 386.

7 Commonwealth *v.* Harnden, 19 Pick. 482.

8 Nelson *v.* Aldridge, 2 Stark. 435; Boinest *v.* Leignez, 2 Rich. 464; Walker *v.* Herring, 21 Gratt. 678; 8 Am. Rep. 616.

9 Jones *v.* Nanney, McClel. 25; 13 Price, 76; Seton *v.* Slade, 7 Ves. 276; Daniel *v.* Adams, Amb. 495.

10 Brent *v.* Green, 6 Leigh, 16; Pike *v.* Balch, 38 Me. 302; Hinde *v.* Whitehouse, 7 East, 558; Higginson *v.* Clowes, 15 Ves. 516. See Adams *v.* Scales, 1 Baxt. 337; 25 Am. Rep. 772.

11 Pike *v.* Balch, 38 Me. 302; Walsh *v.* Barton, 24 Ohio St. 28; Walker *v.* Herring, 21 Gratt. 678; 8 Am. Rep. 616; McComb *v.* Wright, 4 Johns.

Ch. 659; Bird v. Boulter, 4 Barn. & Adol. 446. Compare Adams v. Scales, 57 Tenn. 337.

12 McComb v. Wright, 4 Johns. Ch. 659; Burke v. Haley, 7 Ill. 614; Morton v. Dean, 13 Met. 385.

13 Horton v. McCarty, 53 Me. 394; and see Gathney v. Cason, 74 N. C. 5; 21 Am. Rep. 484; Johnson v. Buck, 35 N. J. L. 338; 10 Am. Rep. 243; Norris v. Blair, 39 Ind. 90; 10 Am. Rep. 135.

14 Bent v. Cobb, 9 Gray, 397.

15 Curtis v. Aspinwall, 114 Mass. 187; 19 Am. Rep. 332; Towle v. Leavitt, 23 N. H. 360; Stains v. Shore, 16 Pa. St. 200; Veazie v. Williams, 3 Story, 611.

16 National Bank v. Sprague, 20 N. J. Eq. 159; Yerkes v. Wilson, 81 Pa. St. 9.

17 Backenstoss v. Stahler, 33 Pa. St. 251

18 Lathan v. Morrow, 6 Mon. B. 630.

19 Bramley v. Alt, 6 Ves. 619; Steele v. Ellmaker, 11 Serg. & R. 86; and see Lee v. Lee, 19 Mo. 420; Mortimer v. Bell, Law R. 1 Ch. App. 10.

20 Reynolds v. Dechaums, 24 Tex. 174.

21 Reynolds v. Dechaums, 24 Tex. 174; and compare Ord v. Noel, 5 Madd. 440; Fox v. Wright, 6 Madd. 111.

22 See Coote v. Coote, 2 I. R. Eq. 159.

§ 377. Statute of Frauds.—At common law, contracts for the purchase and sale of lands are valid, though not in writing.[1] But the English statute (29 Car. 2, c. 3), known as the Statute of Frauds, provides that "no action shall be brought, whereby to charge any person upon any agreement made upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."[2] The substance of this statute has been reenacted in the different States of the Union, and contracts for the sale of lands are thereby required to be in writing.[3] The great purpose of the statute is to afford protection against frauds and perjuries;[4] and this is effected by providing that mere parol proof of such contracts shall be insufficient to establish them in a court of justice.[5] But a contract for the sale of lands need not be under seal;[6] it is enough if it be in writing, and subscribed by the party or his agent lawfully authorized.[7] And the signing of the

memorandum of agreement by one party only is sufficient, provided it be the party sought to be charged.[8] And by the words "the party to be charged" in the statute must be understood the defendant in the action;[9] the note or memorandum must be signed by him, but need not be signed by the plaintiff.[10] The party to be charged who has subscribed the contract is estopped by his signature from denying that the contract was validly executed, although not signed by the other party who sues for the performance.[11]

1 See Cooch v. Goodman, 2 Ad. & E. N. S. 580; Mayberry v. Johnson, 15 N. J. L. 116; Allen v. Beal, 3 Marsh. A. K. 554; 13 Am. Dec. 203.

2 See Browne, Statute of Frauds, App.

3 See Mayberry v. Johnson, 15 N. J. L. 116; Brandeis v. Neustadtt, 13 Wis. 142; Jenkins v. Harrison, 66 Ala. 345; Halsmith v. Castay, 17 La. An. 140; Cal. Civ. Code, § 1741; Marsh v. Hyde, 3 Gray, 332; Work v. Cowhick, 81 Ill. 317.

4 Marsh v. Hyde, 3 Gray, 332; Norman v. Molett, 8 Ala. 546; Welford v. Beazely, 3 Atk. 503; Proctor v. Jones, 2 Car. & P. 534; Phillips v. Hunnewell, 4 Me. 380.

5 Marsh v. Hyde, 3 Gray, 332; Atwood v. Cobb, 16 Pick. 227.

6 Worrall v. Munn, 5 N. Y. 229; and see Owen v. Frink, 24 Cal. 177.

7 Worrall v. Munn, 5 N. Y. 229; Ide v. Stanton, 15 Vt. 685. In New York an actual manual subscription at the end of the contract is required: Vielle v. Osgood, 8 Barb. 130; James v. Patten, 6 N. Y. 9; and see Kurtz v. Cummings, 24 Pa. St. 35. But generally the requirement of the statute in this respect has been liberally construed: see Beakley v. Smith, 11 Sim. 150; Higdon v. Thomas, 1 Har. & G. 130; Anderson v. Harold, 10 Ohio, 399; Caton v. Caton, Law R. 2 H. L. 127; Morison v. Turnour, 18 Ves. 175; Bluck v. Gompertz, 7 Ex. 862.

8 Russell v. Nixon, 3 Wend. 112; Shirley v. Shirley, 7 Blackf. 452; Thayer v. Luce, 22 Ohio St. 62; Lowber v. Cormit, 36 Wis. 176; Martin v. Mitchell, 2 Jacob & W. 426; Gartrell v. Stafford, 12 Neb. 552; Tripp v. Bishop, 56 Pa. St. 428; Estes v. Furlong, 59 Ill. 302. Compare Davis v. Shield, 26 Wend. 362.

9 Newby v. Rogers, 40 Ind. 9.

10 Newby v. Rogers, 40 Ind. 9; Smith v. Arnold, 5 Mass. 414; Getchell v. Jewett, 4 Me. 350; Egerton v. Matthews, 6 East. 307; Shirley v. Shirley, 7 Blackf. 452. But compare Jones v. Noble, 3 Bush, 654; Lawrenson v. Butler, 1 Schoales & L. 13.

11 Worrall v. Munn, 5 N. Y. 229; and see Justice v. Lang, 42 N. Y. 493; 1 Am. Rep. 576.

§ 378. Form of memorandum under statute.— The mere form of the writing or memorandum is not important.[1] As a general rule, whenever evidence of the contract is found in writing, signed by the party to be charged, which is certain and definite, there is all the

evidence the statute requires.[2] Writings, even letters addressed to third persons, of which the party availing himself as evidence had no knowledge when they were written, and which were not written with any view to the execution, or to furnish evidence of the contract, have been received as evidence to meet the requirements of the statute.[3] So a letter in terms repudiating liability, but admitting the making of the contract, signed by the party to be charged, was received as a sufficient memorandum.[4] It is sufficient to satisfy the statute, that the terms of the bargain may be gathered from two or more separate papers, if the signed memorandum contains such reference to the other papers as to make the latter part of the former;[5] but the connection between the signed and unsigned papers cannot be made by parol evidence that they were intended by the parties to be read together, or of facts and circumstances from which such intention may be inferred.[6] An undelivered deed may, under some circumstances, operate as a note or memorandum of a contract for the sale of lands.[7] And deeds not duly recorded, and for that reason invalid as conveyances, have in some cases been regarded as contracts to convey, and as such enforced.[8] The signature of the purchaser to the conditions of sale made by the auctioneer's clerk, as the bids are publicly announced, is held to be a sufficient signing within the statute.[9] But on a sale at public auction the terms of which were to be a credit of nine months on notes with approved security, waiving valuation and appraisement laws, a memorandum of sale made by the clerk, which did not state such terms, was held to be void under the statute.[10] And generally, the memorandum must state expressly or by reference the subject of sale, the terms, and the parties, with such certainty as to furnish evidence of a complete agreement.[11] It is not, however, essential that the description of the property should have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless when the writ-

ing comes to be applied to the subject-matter.[12] But the terms must be sufficient to fit and comprehend the property which is the subject of the transaction, so that, with the assistance of external evidence, the description, without being contradicted or added to, can be connected with and applied to the very property intended, and to the exclusion of all other property.[13] According to the English decisions, the statute requires that the consideration should be expressed in the writing as part of the agreement;[14] and the same construction has been followed in some of the American decisions,[15] while others hold that the requisitions of the statute are satisfied if the agreement is in writing, though the consideration be not expressed.[16]

1 Welford v. Beazely, 3 Atk. 503; Jenkins v. Harrison, 66 Ala. 359.

2 Jenkins v. Harrison, 66 Ala. 345; Atwood v. Cobb, 16 Pick. 227; 26 Am. Dec. 657; Clason v. Bailey, 14 Johns. 487; Ide v. Stanton, 15 Vt. 685. See Wiener v. Whipple, 53 Wis. 298; 40 Am. Rep. 775.

3 Coles v. Trecothick, 9 Ves. 250; Gibson v. Holland, Law R. 1 Com. P. 1; Peabody v. Speyers, 56 N. Y. 230. Compare Washington Ice Co. v. Webster, 62 Me. 341; 16 Am. Rep. 462.

4 Bailey v. Sweeting, 9 Com. B. N. S. 843; and see Fowle v. Freeman, 9 Ves. 351; Dobell v. Hutchinson, 3 Ad. & E. 355.

5 Dobell v. Hutchinson, 3 Ad. & E. 355; Tawney v. Crowther, 3 Bro. C. C. 318; Johnson v. Buck, 35 N. J. L. 338; 10 Am. Rep. 243.

6 Johnson v. Buck, 35 N. J. L. 338; 10 Am. Rep. 243; Ridgway v. Wharton, 6 H. L. Cas. 237; Clinan v. Cooke, 1 Schoales & L. 22.

7 Jenkins v. Harrison, 66 Ala. 358; and see Bowles v. Woodson, 6 Gratt. 78; Parrill v. McKinley, 9 Gratt. 1; Work v. Cowhick, 81 Ill. 317; Campbell v. Thomas, 42 Wis. 437; Thayer v. Luce, 22 Ohio. St. 62.

8 Williams v. Mayor, 6 Har. & J. 529; Moncrieff v. Goldsborough, 4 Har. & McH. 283; and see Somerville v. Trueman, 4 Har. & McH. 252.

9 Johnson v. Buck, 35 N. J. L. 338; 10 Am. Rep. 243. Compare Gwathney v. Casson, 74 N. C. 5; 21 Am. Rep. 484.

10 Norris v. Blair, 39 Ind. 90; 10 Am. Rep. 135.

11 Johnson v. Buck, 35 N. J. L. 338; 10 Am. Rep. 243; Nichols v. Johnson, 10 Conn. 192; Davis v. Townsend, 10 Barb. 333; Commins v. Scott, Law R. 20 Eq. 11; 13 Eng. Rep. 576; Slater v. Smith, 117 Mass. 96; Waring v. Ayres, 40 N. Y. 357; Smith v. Jones, 66 Ga. 338; Honeyman v. Marryatt, 6 H. L. Cas. 112; 21 Beav. 44.

12 Eggleston v. Wagner, 46 Mich. 618.

13 Eggleston v. Wagner, 46 Mich. 618; and see Hagan v. Domestic S. M. Co. 9 Hun. 73; McMurray v. Spicer, Law R. 5 Eq. 527; Ives v. Hazard, 4 R. I. 14.

14 Saunders v. Wakefield, 4 Barn. & Ald. 595.

15 See Leonard v. Vredenburg, 8 Johns. 29; Neelson v. Sanborne, 2 N. H. 414.

16 Miller v. Irvine, 1 Dev. & B. 103; Packard v. Richardson, 17 Mass. 122; Ivory v. Murphy, 36 Mo. 534; Rigby v. Norwood, 34 Ala. 129. The present statute of Alabama requires the expression in writing of the consideration, not leaving it to the uncertainty and infirmity of parol evidence: see Jenkins v. Harrison, 66 Ala. 354.

§ 379. What are lands within the statute.—The word "land" is comprehensive in its meaning, and includes growing grass and standing trees.[1] Contracts for the sale of standing timber are, therefore, held to be contracts for the sale of an interest in land, and must be in writing, under the Statute of Frauds.[2] So of contracts for the sale of growing crops.[3] But a sale of standing trees in contemplation of their immediate separation from the soil was held not to be embraced within the statute.[4] So a sale of a crop of peaches then growing in the seller's orchard, the buyer to gather and remove the peaches as they matured, was held not to be within the statute as a sale of an interest in land.[5] So hops upon the vine are personal chattels, and may be sold as such.[6] Nor is a contract for the delivery of hop roots an agreement relating to real estate, and such contract is not within the statute, although at the time the bargain was made the roots were in the ground.[7] A grant of a right to shoot over land, and to take away a part of the game killed, is a grant of an interest in land, and within the Statute of Frauds.[8] Coal and the right to dig coal are interests in land.[9] So dower, prior to assignment, is an interest in lands within the statute;[10] so of a permanent right to flow land;[11] and possession is held to be an interest in land within the meaning of the statute;[12] and the same has been held in respect to mining claims.[13] But the sale of shares in a mining company, conducted on the cost-book principle, is not a sale of land, or of an interest in land.[14] And sales of lands made by a commissioner under a decree of court are not within the statute, and are valid though not in writing.[15] And a contract for the sale of improvements on land, consisting of houses, is held not to be within the statute.[16] So of a contract

under which one is to make bricks on the land of another, the property in the bricks to remain in the owner of the soil until he has been paid for his clay and wood used and consumed in their manufacture.[17] So of an agreement in a written lease for the renewal thereof, and to pay as rent for such renewal term a certain percentage upon the cash value of the premises, to be fixed by appraisers.[18] And an agreement to return leased premises in the same condition as when taken is valid though not in writing.[19] So an agreement by a husband to convey certain lands to his wife in consideration that she would relinquish her inchoate interest in his lands, which she did, is valid though not in writing.[20] And a parol agreement for a partnership for the purpose of dealing in lands is not within the statute, and is valid.[21]

1 Buck v. Pickwell, 27 Vt. 157; Owens v. Lewis, 46 Ind. 488; 15 Am. Rep. 295; Rodwell v. Phillips, 9 Mees. & W. 501. Compare Marshall v. Ferguson, 23 Cal. 65.

2 Slocum v. Seymour, 36 N. J. L. 138; 13 Am. Rep. 432; Pierrepont v. Barnard, 5 Barb. 364; Hutchins v. King, 1 Wall. 53.

3 Bernal v. Hovious, 17 Cal. 541; Evans v. Roberts, 8 Dowl. & R. 611; 5 Barn. & C. 829; Carrington v. Roots, 2 Mees. & W. 248.

4 Byassee v. Reese, 4 Met. (Ky.) 372; and see Green v. Armstrong, 1 Denio, 550; Kingsley v. Holbrook, 45 N. H. 313; McGregor v. Brown, 10 N. Y. 114.

5 Purner v. Piercy, 46 Md. 212; 17 Am. Rep. 591, and note, 595. An agreement for the sale of growing pears was held to be an agreement for the sale of an interest in land: Rodwell v. Phillips, 9 Mees. & W. 501; and see Emmerson v. Heelis, 2 Taunt. 38.

6 Frank v. Harrington, 36 Barb. 415.

7 Webster v. Zielly, 52 Barb. 482.

8 Webber v. Lee, L. R. 9 Q. B. D. 315.

9 Lear v. Chauteau, 23 Ill. 39.

10 Lothrop v. Foster, 51 Me. 267; Finch v. Finch, 10 Ohio St. 501. Compare Lenfers v. Henke, 73 Ill. 405; 24 Am. Rep. 263; Brown v. Brown, 47 Mo. 130; 4 Am. Rep. 320.

11 Clute v. Carr, 20 Wis. 531; Mumford v. Whitney, 15 Wend. 30.

12 Howard v. Easton, 7 Johns. 205.

13 Copper etc. Co. v. Spencer, 25 Cal. 18. But compare Gore v. McBrayer, 18 Cal. 582. A devise of rents from the testator's real estate, which the executors were directed to sell, is an interest in lands within the statute: Brown v. Brown, 23 N. J. Eq. 550.

14 Powell v. Jessop, 18 Com. B. 336; Watson v. Spratley, 10 Ex. 222.

15 Warfield v. Dorsey, 39 Md. 299; 17 Am. Rep. 562; Watson v. Violett, 2 Duval, 332. Compare Evans v. Ashley, 8 Mo. 177; Christie v. Simpson, 1 Rich. 407.

16 Cassell v. Collins, 23 Ala. 676. See also Thouvenin v. Lea, 26 Tex. 612.

17 Brown v. Morris, 83 N. C. 251.

18 Norton v. Gale, 95 Ill. 533; 35 Am. Rep. 173.

19 Halbut v. Forest City, 34 Ark. 246.

20 Brown v. Rawlings, 72 Ind. 505.

21 Holmes v. McCray, 51 Ind. 358; 19 Am. Rep. 735; and see Gibbons v. Bell, 45 Tex. 417; Trowbridge v. Wetherbee, 11 Allen, 361.

§ 380. Part performance.—It has long been the settled doctrine in equity that a parol contract for the conveyance of lands will, if partly executed by the party seeking relief, be specifically enforced.[1] This equitable doctrine rests on the idea that to plead the statute in the particular instance would work a fraud.[2] And in order to take a case out of the operation of the statute, on the ground that it is partly performed, there must be such a part performance of it on the part of the plaintiff as would render it a fraud on him if the defendant refused to comply with the contract on his part.[3] The conditions under which courts of equity interfere to avoid the statute, upon the ground of part performance, are thus briefly stated: 1. The parol agreement relied on must be certain and definite in its terms; 2. The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved; 3. The agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation.[4] The part performance sufficient to take an agreement out of the statute must be something done with the actual or constructive assent of the party sought to be bound;[5] as, for instance, the taking of possession, or the vendee's entry, with the vendor's consent, and the making of valuable improvements;[6] or the payment of the purchase-money and being let into possession by the vendor.[7] But the vendee, by committing trespass, and taking forcible possession of lands claimed to be sold, against the consent of the owner, cannot evade the provisions of the statute.[8]

So the vendee must have exclusive possession, taken in pursuance of the contract;[9] such a possession as would make him a trespasser in the absence of the contract.[10] Part payment of the purchase-money is not of itself usually regarded as a sufficient part performance to take the contract out of the statute;[11] but if full payment has been made, equity demands that execution should be decreed.[12] The doctrine of part performance does not prevail in courts of law.[13] At law, a parol contract for the sale of land is void, notwithstanding possession and improvements by the purchaser.[14]

1 Wetmore *v.* White, 2 Caines Cas. 87; Newton *v.* Swazey, 8 N. H. 9; Campbell *v.* Campbell, 11 N. J. Eq. 268; Annan *v.* Merritt, 13 Conn. 479; Daniels *v.* Lewis, 16 Wis. 140; Williston *v.* Williston, 41 Barb. 635; Hanlon *v.* Wilson, 10 Neb. 138; Lester *v.* Kinne, 37 Conn. 14; Clinan *v.* Cooke, 1 Schoales & L. 22.

2 Bond *v.* Hopkins, 1 Schoales & L. 433; Brown *v.* Brown, 33 N. J. Eq. 660; Harrow *v.* Johnson, 3 Met. (Ky.) 578; Malins *v.* Brown, 4 N. Y. 403; Postlewait *v.* Frease, 31 Pa. St. 472.

3 Burnett *v.* Blackmar, 43 Ga. 569.

4 By Christian, J., in Wright *v.* Puchett, 22 Gratt. 374; and see Brown *v.* Brown, 33 N. J. Eq. 660; Phillips *v.* Thompson, 1 Johns. Ch. 131; Greenlee *v.* Greenlee, 22 Pa. St. 225; Feusier *v.* Sneath, 3 Nev. 120; McCormick *v.* Grogan, Law R. 4 H. L. 82.

5 Camden etc. R. R. Co. *v.* Stewart, 18 N. J. Eq. 489.

6 Hodges *v.* Green, 28 Vt. 358; Byrd *v.* Odem, 9 Ala. 755; Bowser *v.* Cravener, 56 Pa. St. 132; Baldwin *v.* Thompson, 15 Iowa, 504; Conway *v.* Sherron, 2 Cranch C. C. 80; Moreland *v.* Lemasters, 4 Blackf. 385; Vanduzer *v.* Christian, 30 Ga. 336; Detrick *v.* Sharrar, 95 Pa. St. 521.

7 Kellums *v.* Richardson, 21 Ark. 137; Scott *v.* Newson, 27 Ga. 125; Smith *v.* Smith, 1 Rich. Ch. 130; Fitzsimmons *v.* Allen, 39 Ill. 440; Casler *v.* Thompson, 4 N. J. Eq. 59; Pike *v.* Morey, 32 Vt. 37; Woods *v.* Furmare, 10 Watts, 195.

8 Camden etc. R. R. Co. *v.* Stewart, 18 N. J. Eq. 489; and see Blackeny *v.* Ferguson, 8 Ark. 272; Price *v.* Hart, 29 Mo. 171; Smith *v.* Underdunck, 1 Sand. 579; Eaton *v.* Whitaker, 18 Conn. 222.

9 Greenlee *v.* Greenlee, 22 Pa. St. 225; Wible *v.* Wible, 1 Grant Cas. 406.

10 Smith *v.* Smith, 1 Rich. Eq. 130.

11 Sites *v.* Keller, 6 Ohio St. 483; Hart *v.* McClellan, 41 Ala. 251; Meredith *v.* Naish, 3 Stewt. 207; Fanin *v.* McMullen, 2 Abb. Pr. N. S. 224; Glass *v.* Hulbert, 102 Mass. 24; Jackson *v.* Courtwright, 5 Munf. 308. But see Barickman *v.* Kuykendall, 6 Blackf. 21; Townsend *v.* Houston, 1 Har. (Del.) 532.

12 Fanin *v.* McMullen, 2 Abb. Pr. N. S. 224; and see Lingle *v.* Clemens, 17 Ind. 124.

13 Brandeis *v.* Neustadtt, 13 Wis. 142; Barickman *v.* Kuykenoall, 6 Blackf. 21; Adams *v.* Townsend, 1 Met. 485. Formerly, in Massachusetts, the doctrine of part performance was not recognized, the court having no power to enforce in equity the specific performance of any

but written contracts: see Jacobs v. Peterborough etc. R. R. Co. 8 Cush. 225. So in Maine: Bubier v. Bubier, 24 Me. 42; Patterson v. Yeaton, 47 Me. 308. But the supreme judicial court in those States now has general equity powers and authority to decree specific performance of oral contracts: Somerby v. Buntin, 118 Mass. 279; Pulsifer v. Waterman, 73 Me. 233. See also Lynes v. Hayden, 119 Mass. 482. In some of the States the doctrine is still unrecognized, as, for instance, in North Carolina: Barnes v. Brown, 71 N. C. 507; Mississippi: Hairston v. Jaudon, 42 Miss. 380; and Tennessee: Ridley v. McNairy, 2 Humph. 174.

14 Barickman v. Kuykendall, 6 Blackf. 21; Sallors v. Gambril, 1 Cart. 88; Thomas v. Dickenson, 14 Barb. 90; Norton v. Preston, 15 Me. 14; O'Herlihy v. Hedges, 1 Schoales & L. 123.

§ 381. Construction.—A contract for the purchase and sale of land does not require any particular form or terms,[1] and it should be so construed as to give it effect rather than the contrary.[2] The intention of the parties, as ascertained from the whole instrument, must be carried into effect, if this can be done consistently with legal rules and maxims.[3] Thus, the words "I have sold" should be construed "I have agreed and contracted to sell," in an agreement respecting realty, in order to give effect to it as an executory contract, where it could not operate as an executed contract, and where it is apparent from the whole instrument that the parties intended to make a contract in relation to the sale of such realty.[4] A contract may consist of separate writings, connected by a reference of one to the other, in which case they are to be construed together as forming but one entire agreement.[5] And where two parties enter into a mutual agreement, which is evidenced by a writing signed by each and given to the other, the two instruments are to be taken and construed together as one.[6] A bond for the conveyance of land and a note executed at the same time for the purchase-money are taken as one contract.[7] The same reasonable certainty is requisite to the validity of contracts for the sale of land as in the case of other written agreements;[8] and if a party fails to prove the terms of the agreement relied on, equity will not assist him by directing an issue to ascertain the terms.[9] The description of the premises, to which any effect can be given, must be either perfectly certain of itself, or capa-

ble of being made so by a reference to something extrinsic in the contract.[10] A description in the contract as so many acres of land owned by the vendor, lying in a town, county, and state named, is a sufficient description.[11] In the absence of fraud or mutual mistake, a vendor is bound by his contract as to the quantity of the land, although the result controvenes his intention.[12] A description of a certain number of acres in a corner will be taken to embrace the given number of acres in the form of a square.[13] A written contract for the conveyance of a "bridge" across a certain stream, "together with the toll-house, stables, and outhouses of every description," and "all the privileges and appurtenances appertaining or in any wise belonging to said bridge," was held to pass the land upon which the bridge rested, and upon which the other buildings were erected;[14] in accordance with the doctrine that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing to the grantee.[15] An agreement to sell land, without expressing what interest in it, is construed to mean the whole interest of the vendor.[16] The terms of an agreement for the sale of land must be unambiguous and definitely ascertained, and its defectiveness in this respect cannot be supplied by parol.[17] And as a general rule, parol evidence is not admissible to explain, vary, or control the terms of such an agreement.[18] Though, as an exception to this rule, such evidence is sometimes admitted for the purpose of resisting specific performance,[19] upon the ground of fraud,[20] mistake, or surprise.[21] And such evidence may be admitted for the purpose of raising an equity, founded on the agreement, by proof of collateral circumstances;[22] in which cases parol evidence is not used to vary, contradict, or control the written contract of the parties, but to apply its terms to the subject-matter.[23] As, for instance, to show the position of land and

its condition, the mode of its use and occupation, that it had acquired a local designation or name, and whether it was parcel of a particular estate.[24] For these and similar purposes, it is always competent, and often necessary, to go into parol evidence.[25]

1 Bailey *v.* Ogden, 3 Johns. 399; 3 Am. Dec. 509; Ives *v.* Hazard, 4 R. I. 29; Hurley *v.* Brown, 98 Mass. 545.

2 Atwood *v.* Cobb, 16 Pick. 227; 26 Am. Dec. 657; and see Auburn City Bank *v.* Leonard, 40 Barb. 119.

3 Watson *v.* Blaine, 12 Serg. & R. 131; 14 Am. Dec. 669.

4 Atwood *v.* Cobb, 16 Pick. 227; 26 Am. Dec. 657. See also Jackson *v.* Clark, 3 Johns. 424; Jackson *v.* Myers, 3 Johns. 383; 3 Am. Dec. 504.

5 Morgan *v.* Holford, 17 Jur. 225; 17 Eng. L. & Eq. 174; Ridgway *v.* Wharton, 6 H. L. Cas. 238; Beman *v.* Green, 1 Duer, 382; Jackson *v.* McKenny, 3 Wend. 233; 20 Am. Dec. 690; Clap *v.* Draper, 4 Mass. 266; 3 Am. Dec. 215; Porter *v.* Sullivan, 7 Gray, 446; Hills *v.* Miller, 3 Paige, 254; 24 Am. Dec. 218; Rexford *v.* Marquis, 7 Lans. 261; Isham *v.* Morgan, 9 Conn. 374; 23 Am. Dec. 361; Spangler *v.* Springer, 22 Pa. St. 454.

6 Hunt *v.* Frost, 4 Cush. 54.

7 Black *v.* Bowman, 9 Ark. 501; Duncan *v.* Charles, 4 Scam. 561.

8 Abeel *v.* Radcliff, 13 Johns. 297; Taylor *v.* Ashley, 15 Tex. 50; Minturn *v.* Baylis, 33 Cal. 129; Agord *v.* Valencia, 39 Cal. 292; Stanton *v.* Miller, 58 N. Y. 192; Hamilton *v.* McEldowney, 46 Pa. St. 334; Miller *v.* Campbell, 52 Ind. 125; Lynes *v.* Hayden, 119 Mass. 482; Shelton *v.* Church, 10 Mo. 774; Cox *v.* Middleton, 2 Drew. 209.

9 Savage *v.* Carroll, 2 Ball & B. 444; and see Rose *v.* Cunyghame, 11 Ves. 555, note; Bowman *v.* Cunningham, 78 Ill. 48; Tiernan *v.* Gibney, 24 Wis. 190; Blanchard *v.* McDougal, 6 Wis. 167; Gelston *v.* Sigmond, 27 Md. 334.

10 Lawson *v.* Mead, Hill & D. Supp. 158; 1 How. App. Cas. 394; Ferris *v* Irving, 28 Cal. 645; White *v.* Herrmann, 51 Ill. 243; Lewis *v.* Reichey, 27 N. J. Eq. 240; Robeson *v.* Hornbaker, 3 N. J. Eq. 60; Hodges *v.* Horsfall, 1 Russ. & M. 116.

11 Richards *v.* Edick, 17 Barb. 260; and see Bemis *v.* Becker, 1 Kan. 226. But where land was described by section, but not by township and range, it was held to be too uncertain: Johnson *v.* Craig, 21 Ark. 533; and so, where the description was "a piece of land," with no reference to any other writing for a fuller description: Whelan *v.* Sullivan, 102 Mass. 204. Compare Owen *v.* Thomas, 3 Mylne & K. 353; Nichols *v.* Johnson, 10 Conn. 192.

12 Heyer *v.* Lee, 40 Mich. 353; 29 Am. Rep. 537; and see Dart *v.* Barbour, 32 Mich. 267. A contract for the sale of land is construed strictly as against the vendor: see Adams *v.* Warner, 23 Vt. 395; Falley *v.* Giles, 29 Ind. 114; Seaton *v.* Mapp, 2 Colles, 556; § 304, *ante*.

13 Bybee *v.* Hageman, 66 Ill. 519; and see Martin *v.* Boon, 2 Ohio, 237.

14 Sparks *v.* Hess, 15 Cal. 186.

15 Whitney *v.* Olney, 3 Mason, 280; Wise *v.* Wheeler, 6 Ired. 196; Sheet *v.* Seldon, 2 Wall. 188; Wood *v.* Truckee etc. Co. 24 Cal. 487; and see § 306, *ante*.

16 Bower *v.* Cooper, 2 Hare, 408.

17 Church of Advent *v.* Farrow, 7 Rich. Eq. 378.

18 Tobey v. Leonard, 2 Cliff. 40; Cocke v. Bailey, 42 Miss. 81; Bartlett v. Pickersgill, 1 Cox, 15; Croome v. Lediard, 2 Mylne & K. 251; Lewis v. Day, 53 Iowa, 575; LaForge v. Rickert, 5 Wend. 187; 21 Am. Dec. 209; Haven v. Brown, 7 Met. 421; 22 Am. Dec. 208; Dale v. Smith, 1 Del. Ch. 1; 12 Am. Dec. 64; Stevens v. Cooper, 1 Jones Ch. 425; 7 Am. Dec. 499; Wildbahn v. Robidoux, 11 Mo. 659; Davies v. Tilton, 2 Dru. & War. 232; Ryan v. Hall, 13 Met. 520; Tatman v. Barrett, 3 Houst. 226.

19 See Higginson v. Clowes, 15 Ves. 515.

20 Winch v. Winchester, 1 Ves. & B. 375; and see Dale v. Smith, 1 Del. Ch. 1; 12 Am. Dec. 64; Wharton v. Douglass, 76 Pa. St. 273; Murray v. Duke, 45 Cal. 644.

21 Stevens v. Cooper, 1 Jones Ch. 425; 7 Am. Dec. 499; Dale v. Smith, 1 Del. Ch. 1; 12 Am. Dec. 64; Townshend v. Stangroom, 6 Ves. 328; Wry v. Cutler, 12 Heisk. 28.

22 Davis v. Symonds, 1 Cox, 402.

23 Gerrish v. Towne, 3 Gray, 82, 87; Mead v. Parker, 115 Mass. 413; 15 Am. Rep. 110; Alger v. Kennedy, 49 Vt. 109; 24 Am. Rep. 117; Reed v. Ellis, 68 Ill. 206; and see Stoops v. Smith, 100 Mass. 63; 1 Am. Rep. 85; Sweat v. Shumway, 102 Mass. 365; 3 Am. Rep. 471.

24 Gerrish v. Towne, 3 Gray, 82, 88; and see Moreland v. Brady, 8 Oreg. 303; 34 Am. Rep. 581; Crawford v. Morris, 5 Gratt. 90; Shiels v. Stark, 14 Ga. 429; Murly v. McDermott, 8 Ad. & E. 138; Smith v. Jersey, 2 Brod. & B. 553.

25 Gerrish v. Towne, 3 Gray, 87; Sargent v. Adams, 3 Gray, 78; and see Hannah v. Shirley, 7 Oreg. 115; Terry v. Berry, 13 Nev. 514; Ellis v. Burden, 1 Ala. 458; Vanderkarr v. Thompson, 19 Mich. 82; Marsh v. Bellew, 45 Wis. 36; Thayer v. Torrey, 37 N. J. L. 339; Fusting v. Sullivan, 41 Md. 162. When a written contract for the sale of land is silent as to the mode in which payment is to be made, parol testimony is admissible to show how and in what payment was to be made, that being an independent collateral fact: Paul v. Owings, 32 Md. 402. A collateral undertaking may always be proved by parol: Lamphire v. Slaughter, 61 How. Pr. 36. It is held competent to show by parol that a heater and gas-fixtures were to pass to the purchaser of a house, under a written agreement in which no mention was made of such articles: Heysham v. Dettre, 89 Pa. St. 506.

§ 382. Time of performance.—The time fixed by the parties for the performance of a contract for the sale of land is, at law, deemed to be of the essence of the contract, or a vital provision thereof.[1] If no time for performance is specified, a reasonable time must be allowed.[2] Time, though originally of the essence of the contract, may become immaterial by the subsequent conduct of the parties, and especially where they have acquiesced in extending it.[3] In equity, time is not ordinarily regarded as of the essence of a contract for the sale of land;[4] unless it appears from the terms of the contract or the conduct of the parties that it was the design of the parties to render it essential.[5] As a general rule, if a party has not

been guilty of gross neglect, if his delay can be reasonably explained and be consistent with good faith, and time has not been made material by the contract of the parties, a court of equity will afford relief.[6] Each case is said, however, to depend upon its own circumstances;[7] but in no case will a court of equity relieve a party against his own neglect or default in performing his contract if such relief will seriously injure the other party.[8] Although time be made the essence of the contract, it may be waived;[9] as where the time is allowed to pass, and the parties go on negotiating for completion of the purchase, this is a waiver, and time is no longer of the essence of the contract.[10] In a contract for the purchase of lands, to be performed within so many months, calendar and not lunar months are to be understood;[11] though the word "month" may mean lunar or calendar month according to the intention of the parties.[12]

1 Stevenson *v.* Maxwell, 2 N. Y. 408; Conway *v.* Case, 22 Ill. 127; Morris *v.* School District, 12 Me. 293; Hill *v.* Fisher, 34 Me. 143; Burlington *v.* Boesler, 15 Iowa, 555; Tiernan *v.* Roland, 15 Pa. St. 429; Marshall *v.* Powell, 9 Q. B. 779; Falls *v.* Carpenter, 1 Dev. & B. Eq. 277; Roberts Berry, De Gex, M. & G. 289; Tilley *v.* Thomas, Law R. 3 Ch. App. 69.

2 Wiswall *v.* McGown, 2 Barb. 270; McMurray *v.* Spicer, Law R. 5 Eq. 527, 543; Pickering *v.* Pickering, 38 N. H. 400; Meason *v.* Kaine, 67 Pa. St. 126; Benson *v.* Tilton, 24 How. Pr. 494; Ditto *v.* Harding, 73 Ill. 117.

3 Schroeppel *v.* Hopper, 40 Barb. 425; and see Hull *v.* Sturdivant, 46 Me. 34; Stow *v.* Russell, 36 Ill. 19; Shafer *v.* Niver, 9 Mich. 253; Voltz *v.* Grummett, 49 Mich. 453. A parol agreement to alter or enlarge the time for completing a contract for the sale of land is void: Doar *v.* Gibbes, 1 Ball. Eq. 371; Avery *v.* Kellogg, 11 Conn. 575; Stowell *v.* Robinson, 3 Bing. N. C. 923; but the courts distinguish between a contract to alter or enlarge the time and a mere voluntary forbearance to insist upon a performance at the time originally agreed upon: Ogle *v.* Vane, Law R. 2 Q. B. 275; Aff'd, Law R. 3 Q. B. 272. The distinction is the same as that between a mere license and a contract: Ogle *v.* Vane, Law R. 2 Q. B. 275.

4 Radcliffe *v.* Warrington, 12 Ves. 376; Lennon *v.* Napper, 2 Schoales & L. 683; Richmond *v.* Robinson, 12 Mich. 193; Jones *v.* Robbins, 29 Me. 351; Bashier *v.* Gratz, 6 Wheat. 523; Barnard *v.* Lee, 97 Mass. 92; Chadwell *v.* Winston, 3 Tenn. Ch. 110.

5 Huffman *v.* Hummer, 17 N. J. Eq. 263; Jones *v.* Dobbins, 29 Me. 351; Walton *v.* Wilson, 30 Miss. 576; Pennock *v.* Ela, 41 N. H. 189; Missouri River etc. R. R. Co. *v.* Brickley, 21 Kans. 275; Knott *v.* Stevens, 5 Oreg. 235.

6 Williston *v.* Williston, 41 Barb. 635; and see Tilley *v.* Thomas, Law R. 3 Ch. App. 61; Roberts *v.* Berry, 3 De Gex, M. & G. 284.

7 Wells *v.* Wells, 3 Ired. 596; Ruckman *v.* King, 19 N. J. Eq. 300; Jones *v.* Robbins, 29 Me. 351.

8 Ruckman v. King, 19 N. J. Eq. 300; and see Tilley v. Thomas, Law R. 3 Ch. App. 67; Brashier v. Gratz, 6 Wheat. 528; McCay v. Carrington, 1 McLean, 50; Potter v. Tuttle, 22 Conn. 512; Merritt v. Brown, 19 N. J. Eq. 286; Edwards v. Atkinson, 14 Tex. 373.

9 Moody v. Griffin, 60 Ga. 459; Dennis v. M'Cogg, 32 Ill. 429; Carpenter v. Blandford, 8 Barn. & C. 575; Linscott v. Buck, 33 Me. 530.

10 Webb v. Hughes, Law R. 10 Eq. 286; Falls v. Carpenter, 1 Dev. & B. Eq. 277; Wolf v. Willitts, 35 Ill. 89.

11 Shapley v. Garey, 6 Serg. & R. 539; Hipwell v. Knight, 1 Younge & C. 419; and see Lang v. Gale, 1 Maule & S. 111.

12 Hipwell v. Knight, 1 Younge & C. 419.

§ 383. Title.—In the absence of countervailing stipulation or evidence, an agreement to sell land implies, on the part of the vendor, an agreement to convey a good and unencumbered title.[1] The right of the purchaser to have such a title does not grow out of the agreement between the parties, but is given by law, and he may insist upon it, not because it is stipulated for in the agreement, but on the general right of a purchaser to require it.[2] If the vendor contracts to make "a good and sufficient deed," or "a good warranty deed," or "a deed free of all encumbrances," etc., for a stipulated price, he is bound to convey a good title;[3] unless it appears from the contract itself, or from the circumstances accompanying it, that the parties have in view merely such a conveyance as will pass the title which the vendor has, whether defective or not.[4] Such implied warranty of title exists so long as the contract remains executory;[5] but upon the execution of the contract by a deed or conveyance, the law throws upon the purchaser the responsibility of caring for his own protection by suitable express covenants.[6] An agreement to convey land, generally, means a conveyance in fee, unless it appears that the parties intended to contract on the basis of a lesser estate.[7] A party will not be compelled to pay his money and take a doubtful title, or an encumbered property, unless he has bargained for such.[8] And a title is held to be doubtful when it is such as other persons may fairly question, although the court may entertain a favorable opinion of it.[9] And a doubtful title cannot be made marketable by an opinion

of a court on a case stated between vendor and vendee.[10] Every title is doubtful which invites or exposes the party holding it to litigation.[11] But a purchaser will not be permitted to reject a title on account of a bare possibility of its proving to be imperfect.[12] Mere suspicion upon opinions in the abstract, etc., will not support an objection by a purchaser.[13] And in an action against the purchaser, the vendor need not show title, but the burden of proof is on the defendant to show that he has none.[14] A covenant to convey the title means the legal estate in fee, free from all valid claims, liens, or encumbrances;[15] and as a general rule, the purchaser must have the legal estate, and is not to be compelled to take an equitable estate.[16] A contract to make a good title means a title good both at law and in equity, and a court of law will adjudge a title to be either good or bad, having no middle term for it.[17] A vendee will not be compelled to accept a title founded on a decree against an infant, for the reason that the latter may show cause against it when of age.[18] An agreement to sell land, and to execute and deliver a warranty deed thereof, is not complied with by a deed from the husband only, but the wife must join;[19] a party purchasing a title clear of encumbrances is not bound to accept one subject to a right of dower.[20] Title under a deed not seasonably recorded is bad;[21] so of a title by foreclosure where the owner was not a party to the suit.[22] Nor will a purchaser be compelled to take a title depending upon the words of a will which are too doubtful ever to be settled without litigation;[23] nor to accept a title made out by presumption from length of possession.[24]

1 Shreek *v.* Pierce, 3 Iowa, 350; Watts *v.* Waddle, 1 McLean, 200; Holland *v.* Holmes, 14 Fla. 380; Delavan *v.* Duncan, 40 N. Y. 485; Flinn *v.* Barber, 64 Ala. 193; Anon. 2 Abb. N. C. 56; Woodruff *v.* Thorne, 49 Ill. 88; Clute, *v.* Robinson, 2 Johns. 611; Penfield *v.* Clark, 62 Barb. 584; White *v.* Foljambe, 11 Ves. 337; Souter *v.* Drake, 5 Barn. & Adol. 902. It is however held in Massachusetts, that under an agreement to sell land, a covenant to convey a good title does not necessarily entitle the covenantee to a warranty deed: Kyle *v.* Kavanagh, 103 Mass. 356; 4 Am. Rep. 560; and see, to same effect, Tinney

v. Ashley, 15 Pick. 564; Gazely v. Price, 16 Johns. 267; Joslyn v. Taylor, 33 Vt. 470; Brown v. Covilland, 6 Cal. 566; Green v. Covilland, 10 Cal. 322. Compare Winter v. Stock, 29 Cal. 407.

2 Prothro v. Smith, 6 Rich. Eq. 324; Lounsberry v. Locamber, 25 N. J. Eq. 554; White v. Foljambe, 11 Ves. 337; Cullum v. Bank of Alabama, 4 Ala. 21.

3 Owings v. Baldwin, 8 Gill, 337; Brown v. Gannon, 14 Me. 276; Abendroth v. Greenwich, 29 Conn. 356; Jones v. Huff, 36 Tex. 678; Holland v. Holmes, 14 Fla. 390; Wilson v. Getty, 57 Pa. St. 266.

4 Luckett v. Williamson, 31 Mo. 55; 37 Mo. 388; Porter v. Noyes, 2 Me. 22; 11 Am. Dec. 30, and note 34; Cogan v. Cook, 22 Minn. 137; Den v. Tindall, 20 N. J. L. 214; Bateman v. Johnson, 10 Wis. 1; Davis v. Henderson, 17 Wis. 105; Refeld v. Woodfolk, 23 How. 327; Hoback v. Kilgores, 26 Gratt. 442; 21 Am. Rep. 317; Deacons v. Doyle, 1 Matt. (Va.) 258.

5 Cullum v. Bank of Alabama, 4 Ala. 21.

6 Cullum v. Bank of Alabama, 4 Ala. 21; Walsh v. Hall, 66 N. C. 233.

7 Goddin v. Vaughn, 14 Gratt. 102; Witter v. Biscoe, 13 Ark. 422; Vardeman v. Lawson, 17 Tex. 10; Tremaine v. Lining, Wright, 644.

8 Chambers v. Tulane, 9 N. J. Eq. 146; Regney v. Coles, 6 Bosw. 479; Stapylton v. Scott, 16 Ves. 272; Mitchell v. Stelhmetz, 97 Pa. St. 254.

9 Pyrke v. Waddingham, 10 Hare, 1; 17 Eng. L. & Eq. 534. Compare Sohier v. Williams, 1 Curt. 479.

10 Pratt v. Eby, 67 Pa. St. 396.

11 Speakman v. Forepaugh, 44 Pa. St. 363.

12 Lawrens v. Lucas, 6 Rich. Eq. 217; Dalzell v. Crawford, 1 Pars. Cas. 37; Emery v. Grocock, 6 Madd. 54; and see Wilsey v. Dennis, 44 Barb. 354; Crawford v. Murphy, 22 Pa. St. 84.

13 M'Queen v. Farquhar, 11 Ves. 467.

14 Breithaupt v. Thurmond, 3 Rich. 216. *Prima facie*, he who enters upon land under a contract to purchase admits the title of the vendor to be good, and if he fails to comply with the terms of the contract, he, or any one holding under him, cannot, in an action by the vendor to regain possession of the land, put the vendor to proof of his title: Pyles v. Reeve, 4 Rich. 555.

15 Jones v. Gardner, 10 Johns. 266; Kelly v. Bradford, 3 Bibb. 317.

16 Abel v. Heathcote, 2 Ves. 100; Littlefield v. Tinsley, 26 Tex. 353; Smith v. Robertson, 23 Ala. 312.

17 Maberley v. Robins, 5 Taunt. 625; 1 Marsh. 258; Cullum v. Bank of Alabama, 4 Ala. 21.

18 Bryan v. Reed, 1 Dev. & B. Eq. 86; and see Bullock v. Bullock, 1 Jacob & W. 603.

19 Pomeroy v. Drury, 14 Barb. 418; Watts v. Waddle, 1 McLean, 200.

20 Lewis v. Coxe, 5 Har. (Del.) 401; Runnels v. Webber, 59 Me. 488; Bigelow v. Hubbard, 97 Mass. 195; Harrington v. Murphy, 109 Mass. 289; Heimburg v. Ismay, 3 Jones & S. 35. But see Bostwick v. Williams, 36 Ill. 65; Powell v. Monson etc. Co. 3 Mason, 355.

21 Collins v. Delashmutt, 6 Oreg. 51; Speakman v. Forepaugh, 44 Pa. St. 463.

22 Joughans v. M'Cormick, 18 Cal. 660.

23 Sharp v. Adcock, 4 Russ. 374; Collard v. Sampson, 17 Jur. 569, 641; 21 Eng. L. & Eq. 352; Jervoise v. Northumberland, 1 Jacob & W. 569.

24 Tevis v. Richardson, 7 Mon. 654. Sixty years' possession is an

unobjectionable title to a fee-simple: Barnwall v. Harris, 1 Taunt. 430. And a purchaser may be compelled to take a title depending upon parol evidence of adverse possession under the Statute of Limitations: 3 & 4 Will. 9, c. 27; Scott v. Nixon, 3 Dru. & War. 388. A vendee, although he intends to purchase lands for the purpose of annoying tenants adjoining, is not bound to accept an imperfect title if he has stipulated for a good one: Hollenbaugh v. Morrison, 9 Watts, 408.

§ 384. Defect in title—Relief.—Although a valid title is implied in a contract for the sale of land,[1] yet one who buys a defective title, knowing it to be so, must abide the consequences.[2] A party selling land by a "chancing bargain" is not responsible for the title.[3] Where the vendor undertakes to point out to the purchaser the boundaries of the land, or the place where it lies, or its improvements, he does so at his peril.[4] But if the purchaser can obtain substantially what he bargained for, and the deficiency is of a nature justly to be made a subject of compensation, a specific performance will be decreed.[5] As a general rule, the vendee shall have what the vendor can give, with an abatement out of the unpaid purchase-money for so much as the quantity falls short of the representation.[6] If title to part of a tract of land fails, the purchaser may claim performance as to the residue, with an abatement from the purchase-money for the deficiency.[7] When land is sold as containing so many acres "more or less," if the quantity, on an actual survey and estimation, either overrunning or falling short of the contents named be small, no compensation should be recovered by either party;[8] but if the variance is considerable, the party sustaining the loss should be allowed for it.[9] A vendee who holds his vendor's bond for title, and who remains in undisturbed possession, cannot resist the payment of the purchase-money on account of a defect in the title without showing that the vendor is insolvent or unable to respond in damages.[10] And the fact that title to land has been questioned or even assailed in court does not, in the absence of a judgment or execution thereon, constitute a good defense to an action for the purchase-money.[11] So a vendee who has paid part of the

purchase-money, and given a mortgage for the residue, will not be relieved against the security given on the mere ground of a defect of title, where there is no allegation of fraud in the sale, and he has not been evicted;[12] he will be remitted to his remedy at law upon the covenants in his deed.[13] If a vendee accepts a contract in which the ownership of the vendor is assumed, and agrees to pay for the land without requiring the vendor to produce evidence of his title, the burden will be upon him to show defects.[14] He is presumed to have satisfied himself as to the title when he made his bargain.[15]

1 See Winne *v.* Reynolds, 6 Paige, 407; § 382, *ante*.

2 Beck *v.* Simmons, 7 Ala. 71; Williamson *v.* Raney, 1 Freem. (Miss.) 112. In the absence of any fraud or warranty, the purchaser cannot resist the payment of the purchase-money on account of defects in the title which were known to him: Strong *v.* Waddell, 56 Ala. 471; and see Mayo *v.* Purcell, 3 Munf. 243.

3 Nelson *v.* Forgey, 4 Marsh. J. J. 569.

4 Cowger *v.* Gordon, 4 Blackf. 110; Hampton *v.* Eubank, 4 Marsh. J. J. 634; Eubank *v.* Hampton, 1 Dana, 343; and see Ragan *v.* Gwinn, 19 La. An. 133. Where a specified tract of land is sold for a sum in gross, the boundaries of the tract control the description of the quantity it contains, and neither party can have a remedy against the other for an excess or deficiency in the quantity, unless such excess or deficiency is so great as to furnish evidence of fraud or misrepresentation: Voorhees *v.* DeMeyer, 2 Barb. 48; and see Chipman *v.* Briggs, 5 Cal. 76; Gillilan *v.* Hinkle, 8 W. Va. 262.

5 Guynet *v.* Mantel, 4 Duer, 86; King *v.* Bardeau, 6 Johns. Ch. 38; Winne *v.* Reynolds, 6 Paige, 407; Guest *v.* Homfray, 5 Ves. 818.

6 Kent *v.* Carcaud, 17 Md. 291; Mendenhall *v.* Steckell, 47 Md. 453; Morss *v.* Elmendorf, 11 Paige, 277; Hawk *v.* Pollard, 6 Blackf. 103; and see Westervelt *v.* Matheson, 1 Hoff. Ch. 37; Smith *v.* Pettus, 1 Stewt. & P. 107.

7 King *v.* Wilson, 6 Beav. 124; Voorhees *v.* DeMayer, 2 Barb. 37; Tomlinson *v.* Savage, 6 Ired. Eq. 430; Hill *v.* Buckley, 17 Ves. 394; People *v.* Stephens, 71 N. Y. 555. The purchaser has an election to proceed with the purchase *pro tanto*, or to abandon it altogether: id.

8 Darling *v.* Osborne, 51 Vt. 157; Couse *v.* Boyles, 4 N. J. Eq. 216; Winch *v.* Winchester, 1 Ves. & B. 375; Pedan *v.* Owen, Rice Eq. 55; Ketchum *v.* Stout, 20 Ohio, 453; Tyson *v.* Hardesty, 29 Md. 305; Stephens *v.* Hudson, 54 Ga. 513.

9 Darling *v.* Osborne, 51 Vt. 157. On a contract to convey "about sixty-five acres," the vendee is not bound to accept thirty or thirty-six acres: Baltimore etc. Land Soc. *v.* Smith, 54 Md. 187; 39 Am. Rep. 374. The introduction of the words "more or less," following the enumeration of the number of acres, is no obstacle to relief in equity upon the ground of mistake: Belknap *v.* Sealey, 14 N. Y. 143; Paine *v.* Upton, 87 N. Y. 327. See Josselyn *v.* Edwards, 57 Ind. 212.

10 Wyatt *v.* Garlington, 56 Ala. 576; and see Blanks *v.* Walker, 54 Ala. 117.

11 Deetz *v.* Mock, 47 Iowa, 451; and see Miller *v.* Argylis, 5 Leigh, 460.

12 Ryerson *v.* Willis, 81 N. Y. 280.

13 Bumpus *v.* Platner, 1 Johns. Ch. 218; Abbott *v.* Allen, 2 Johns. Ch. 519. If a vendee knows the condition of a title he is buying, and takes a deed with covenants, he can only rely upon his covenants for protection: Gartman *v.* Jones, 24 Miss. 234; and see Leird *v.* Abernathy, 10 Heisk. 626.

14 Tuxbury *v.* French, 41 Mich. 13.

15 Dwight *v.* Cutler, 3 Mich. 566; Allen *v.* Atkinson, 21 Mich. 361.

§ 385. Tender of deed.—In general, if there is a contract for the sale of land, and the agreement of the parties is concurrent and to be executed at the same time, the vendor cannot maintain an action for the price nor for damages for the non-performance of the contract, without showing that he had tendered a title deed, or that the purchaser had waived the tender, or otherwise made it nugatory by his act or conduct.[1] The preparation of the deed is considered a part of the vendor's undertaking, unless the terms of the contract furnish an inference to the contrary.[2] It is however held in New York, that it is not necessary for a vendor, under a covenant to convey, to make out and tender a deed on the day the purchase is to be completed.[3] He is not bound to prepare it until the vendee is ready to demand it, and even then he is allowed a reasonable time to draw and execute it.[4] So in Alabama it is the duty of the purchaser to prepare a deed and tender it to the vendor to be executed, and it is the duty of the vendor, when required, to furnish to the purchaser an abstract of the title.[5] So by custom in Pennsylvania, the purchaser should tender for execution the necessary papers, and especially where the time of payment is optional with him.[6] At common law, unless there is an express agreement to the contrary, the cost of the conveyance falls upon the vendee.[7] If several lots are sold, the vendor is bound, if required, to give separate deeds, and his offer to execute one deed does not render the contract entire.[8] A vendor of land in his own right is bound to convey it with general warranty, unless it be otherwise agreed between the parties.[9] Under a contract that does not specify what sort of a

deed the purchaser is entitled to, he may demand a deed with customary covenants.[10] What is customary is to be determined by the *lex rei sitæ*.[11]

1 Dubignon *v.* Land, 5 Rich. 251; Melton *v.* Coffelt, 59 Ind. 310; Overly *v.* Tipton, 68 Ind. 414; Pershing *v.* Canfield, 70 Mo. 140; Ariedge *v.* Rooks, 22 Ark. 427; Seeley *v.* Howard, 13 Wis. 336; Winton *v.* Sherman, 20 Iowa, 295.

2 Christian *v.* Nixon, 11 Ired. 3; Headley *v.* Shaw, 39 Ill. 354; Winton *v.* Sherman, 20 Iowa, 295; Tinney *v.* Ashley, 15 Pick. 546; and see Cooper *v.* Brown, 2 McLean, 495; Smith *v.* Haynes, 9 Me. 128. If no place is fixed for the delivery of the deed, the vendor is bound to seek the vendee and tender the deed: Franchat *v.* Leach, 5 Cowen, 506.

3 Wells *v.* Smith, 2 Edw. Ch. 78; 7 Paige, 22.

4 Wells *v.* Smith, 2 Edw. Ch. 78; 7 Paige, 22; and see Fuller *v.* Williams, 7 Cowen, 53; Newcomb *v.* Brackett, 16 Mass. 161.

5 Wade *v.* Killough, 5 Stewt. & P. 450; Chapman *v.* Lee, 55 Ala. 623.

6 Tiernan *v.* Roland, 15 Pa. St. 429.

7 Winter *v.* Jones, 10 Ga. 190; Stephens *v.* Medina, 3 Gale & D. 110; Poole *v.* Hill, 6 Mees. & W. 835.

8 Van Eps *v.* Schenectady, 12 Johns. 436.

9 Hoback *v.* Kilgores, 26 Gratt. 442; Goddin *v.* Vaughn, 14 Gratt. 102; Vardeman *v.* Lawson, 17 Tex. 10; Clark *v.* Lyons, 25 Ill. 105; Clark *v.* Redman, 1 Blackf. 380; Penfield *v.* Clark, 62 Barb. 584; Delavan *v.* Duncan, 49 N. Y. 485. A contract to convey to the purchaser a "clear title" entitles the purchaser to a conveyance of the land with general warranty, and free of encumbrance: Kenny *v.* Hoffman, 31 Gratt. 442.

10 Dwight *v.* Cutler, 3 Mich. 566; Allen *v.* Hazen, 26 Mich. 146.

11 Gault *v.* Van Zile, 37 Mich. 22.

§ 386. At what time title passes.—As a general rule, the acceptance by a purchaser of a deed for land is to be deemed *prima facie* full execution of an agreement to convey.[1] Thenceforth the agreement becomes void, and the rights of the parties are to be determined by the deed, and not by the agreement.[2] But this rule is subject to some exceptions, as when there are collateral covenants,[3] or when the stipulation is to do a series of acts at successive periods, or to perform, simultaneously, two or more distinct and separable acts.[4] In the latter case, the executory contract becomes extinct only as to such of its parts as are covered by the conveyance.[5] And when the defendant agreed to convey a piece of land, and also to convey, or cause to be conveyed, the interest of A. B. in another piece, it was held that a deed conveying only

one parcel was but in part fulfillment, the contract contemplating two conveyances.[6] Upon an agreement to sell land, it is competent for the parties to stipulate that the title shall pass at the time, or that it shall be withheld until some future day, or until the performance of a further condition;[7] and if, upon a survey of the entire instrument, the latter intention appears, it must prevail.[8]

1 Long *v.* Hartwell, 34 N. J. L. 116; and see Frazer *v.* Robinson, 42 Miss. 121.

2 Carter *v.* Beck, 40 Ala. 599; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 273; Jones *v.* Wood, 16 Pa. St. 25; Long *v.* Hartwell, 34 N. J. L. 116; Carr *v.* Roach, 2 Duer, 20; Crotzer *v.* Russell, 9 Serg. & R. 78.

3 See Long *v.* Hartwell, 34 N. J. L. 116. The covenant, in order to be deemed collateral and independent, so as not to be destroyed by the execution of the deed, must not look to or be connected with the title, possession, quantity, or emblements of the land which is the subject of the contract. If it does so, the execution of the deed, in pursuance of the contract, will operate as an extinguishment of it: Bull *v.* Willard, 9 Barb. 641; and see Carter *v.* Beck, 40 Ala. 599.

4 Witbeck *v.* Waine, 16 N. Y. 532; Long *v.* Hartwell, 34 N. J. L. 116; and see Murdock *v.* Gilchrist, 52 N. Y. 247; Davis *v.* Lottich, 46 N. Y. 393.

5 Long *v.* Hartwell, 34 N. J. L. 124.

6 Brown *v.* Moorhead, 8 Serg. & R. 569.

7 Jackson *v.* Moncrief, 5 Wend. 26; Carnes *v.* Apperson, 2 Sneed, 562.

8 Topp *v.* White, 12 Heisk. 173, 174.

§ 387. Rescission of contract.—Failure of title, either in whole or in part, is a sufficient ground for decreeing the rescission of a contract for the sale of land.[1] But the offer to rescind on the part of the vendee should be made as soon as he discovers the defect.[2] So the parties are to be placed *in statu quo* upon a rescission;[3] though if this rule cannot be literally complied with, a substantial compliance may be sufficient.[4] And a party entitled to rescind, because of failure of title as to part, waives that right by accepting a conveyance of the residue without objection.[5] Nor will a rescission be allowed because of defect of title, where it is apparent at the hearing that a perfect title may be made, and no fraud is alleged or proved.[6] And if a party seeking to rescind has been negligent, and guilty of unreasonable delay,

and especially if there has been a change of circumstances in any material particulars, a rescission will not be decreed.[7] The general rule is, that a contract for the purchase of land will not be rescinded upon stale objections to the title after long and undisturbed possession.[8] If a vendee fails to comply with the terms of the contract under which he obtained possession, the vendor is at liberty to treat the contract as rescinded, and to regain possession by ejectment.[9] On the other hand, if a vendor brings ejectment to recover lands which are in the possession of the vendee, under a parol contract of sale, it amounts to a rescission of the contract, and the vendee can recover the purchase-money paid.[10] The surrender of a written contract of sale, followed by acts inconsistent with its continuance, such as negotiating a sale to another party by the surrenderer for the benefit of the surrenderee, operates, in equity, as a rescission of such contract.[11] The fact that a purchaser left the State before fulfilling his contract to purchase was held to be no abandonment of the contract.[12]

1 Owens *v.* Rector, 44 Mo. 389; Johnson *v.* Siesfield, 6 Baxt. 41; Lang *v.* Brown, 4 Ala. 622; Martin *v.* Atkinson, 7 Ga. 228; Chastian *v.* Stanley, 23 Ga. 26; York *v.* Gregg, 9 Tex. 85; Judson *v.* Wass, 11 Johns. 525. Adverse possession is alone a sufficient ground for rescission: Williams *v.* Carter, 3 Dana, 198.

2 Newell *v.* Turner, 9 Port. 420; Lacey *v.* McMillen, 9 Mon. B. 523; Garrett *v.* Lynch, 45 Ala. 204. See Holt's Appeal, 98 Pa. St. 257.

3 Staley *v.* Murphy, 47 Ill. 241; Latham *v.* Hickey, 21 La. An. 425; Percival *v.* Hichborn, 56 Me. 575; Schroeppel *v.* Hopper, 40 Barb. 425; Harris *v.* Catlin, 37 Tex. 581; Masson *v.* Swan, 6 Helsk. 450; Martin *v.* Chambers, 84 Ill. 579; Smith *v.* Brittenham, 98 Ill. 188.

4 Williams *v.* Carter, 3 Dana, 198.

5 Harrison *v.* Deramus, 33 Ala. 463; and see Gale *v.* Nixon, 6 Cowen, 446; Barnett *v.* Gaines, 8 Ala. 373; Cummins *v.* Boyle, 1 Marsh. J. J. 480; Perkins *v.* Williams, 5 Cold. 512.

6 Westall *v.* Austin, 5 Ired. Eq. 1; Fletcher *v.* Wilson, 1 Smedes & M. Ch. 376; Wickliffe *v.* Lee, 6 Mon. B. 543. A rescision will not be decreed for an innocent misrepresentation of the state of the title, if at the hearing the title is perfected so as to be as represented: Buford *v.* Guthrie, 14 Bush. 690; Davidson *v.* Moss, 5 How. (Miss.) 683.

7 Taylor *v.* Fleet, 1 Barb. 471; Jones *v.* Smith, 33 Miss. 215; McKeen *v.* Beaupland, 35 Pa. St. 488.

8 Edwards *v.* Morris, 1 Ohio, 524; and see McNaughton *v.* Partridge, 11 Ohio, 223; Wright *v.* Vanderplank, 8 De Gex, M. & G. 133; Jarratt *v.* Aldam, Law R. 9 Eq. 463.

9 Burnett v. Caldwell, 9 Wall. 290; Jackson v. Walker, 7 Cowen, 637; Tibbs v. Morris, 44 Barb. 138.

10 Hairston v. Jaudon, 42 Miss. 380.

11 Crane v. Decamp, 21 N. J. Eq. 414.

12 Creamer v. Ogden, 16 Ind. 176. What amounts to an abandonment of a contract is held to be a question of law and not of fact: Dula v. Cowles, 7 Jones (N. C.) 290.

§ 388. **Mistake.**—The courts will grant relief against mistakes of fact, and on that ground will set aside contracts for the sale and purchase of land.[1] But, generally speaking, if there is a mistake of law, and no proof of any fraud or imposition, a party must abide the consequences of his ignorance, and cannot on that account be permitted to avoid his contract;[2] and a mistake of law happens when a party having full knowledge of the facts comes to an erroneous conclusion as to their legal effect.[3] There are, however, exceptions to the general rule,[4] and especially, if the mistake is a mixed one of law and fact, relief will be granted when justice and equity require it.[5] And it is held that a contract entered into under a mutual misconception of legal rights, amounting to a mistake of law in the contracting parties, by which the object of it cannot be accomplished, is as liable to be set aside or rescinded as a contract founded in mistake of matters of fact.[6] Where there was a mutual mistake of parties as to the interest of the vendor in the land sold, it was held that the sale should be set aside.[7] An administrator sold lands of his intestate to B, both supposing the fee was conveyed, whereas only an equity of redemption was passed, and it was held that the purchaser was entitled to relief in equity.[8] And more especially when the mutual mistake is attributable to the agent of the party seeking to take advantage of it will equity grant relief.[9] But in a recent case, the plaintiff, proposing to buy the defendant's interest in certain lands, was informed of all the facts affecting the title. An attorney acting for both parties, upon consideration of those facts, advised the parties that the defendant had

a certain interest in the lands, and the plaintiff, acting upon that advice, purchased the supposed interest; this advice being incorrect, it was held that the mistake was one of law only, and that the plaintiff was not entitled to recover the purchase-money.[10] So where an executor purchased lands belonging to his testator's estate at a public sale made by himself and his co-executors, under a mistake of law as to the power of sale conferred on them by the will, relief from his purchase was denied.[11] As it respects mistakes of fact, equity relieves against them as well as frauds, in a deed or contract in writing,[12] and this, either where the plaintiff seeks relief affirmatively, on the ground of mistake, or where the defendan. sets it up as a defense, or to rebut an equity.[13] If it appears that both parties to a contract were mistaken as to the situation of the land, and other circumstances materially affecting its value, the contract will be rescinded.[14] But equity will not relieve a vendee on the ground of a mutual mistake as to the boundaries, unless the mistake be fully and clearly proved.[15] When a misrepresentation is made as to quantity, though innocently, the purchaser is entitled to have what the vendor can give, with an abatement out of the purchase-money for so much as the quantity falls short of the representation;[16] and this right of the purchaser exists as well after the execution of the deed as before, where the mistake was not known when the deed was executed.[17] Where by mutual mistake 206 acres were conveyed as "about 222 acres, be the same more or less," the price being fixed at so much an acre, and a mortgage given for part, the grantee was held entitled to a corresponding abatement therefrom.[18] So on a contract to convey "about sixty-five acres," the vendee is not bound to accept thirty or thirty-six acres.[19] A sale of land by metes and bounds, and of estimated quantity for a given sum, imports a sale in gross, and a much larger deficit in quantity would be required to evidence mistake than where the sale was by

the acre.[20] On a sale of land by the acre, relief is to be granted for all deficiencies not reasonably imputable to the variation of instruments and small errors in surveys, whether the purchaser has expressly retained an election to have the tract surveyed or not.[21]

1 Hough *v.* Richardson, 3 Story, 659; Hurd *v.* Hall, 12 Wis. 112; Champlin *v.* Laytin, 18 Wend. 407; Spurr *v.* Benedict, 99 Mass. 463; Tuthill *v.* Babcock, 2 Wood. & M. 289; Bridger *v.* Rice, 1 Jacob & W 74; Jennings *v.* Broughton, 5 De Gex, M. & G. 126; Honeyman *v.* Marryatt, 6 H. L. Cas. 111; Baptiste *v.* Peters, 51 Ala. 158.

2 Marshall *v.* Collett, 1 Younge & C. 232; Burkhauser *v.* Schmitt, 45 Wis. 316; 30 Am. Rep. 740; Cooper *v.* Phibbs, L. R. 2 E. & Ir. App. 170; McAninch *v.* Laughlin, 13 Pa. St. 371; McDaniel *v.* Grace, 15 Ark. 465.

3 Dixon, C. J., in Hurd *v.* Hall, 12 Wis. 124.

4 See Bank of United States *v.* Daniel, 12 Peters, 32; Hunt *v.* Rousmanier, 8 Wheat. 174; Tyson *v.* Tyson, 31 Md. 134.

5 King *v.* Doolittle, 1 Head, 77; Gross *v.* Leber, 47 Pa. St. 520; Griffith *v.* Townley, 69 Mo. 13; 33 Am. Rep. 476; Compare Haden *v.* Weare, 15 Ala. 149.

6 Champlin *v.* Laytin, 1 Edw. Ch. 471; and see Brown *v.* Lamphear 35 Vt. 252; Willan *v.* Willan, 16 Ves. 82; Cooper *v.* Phibbs, 2 H. L. Cas 149.

7 Irick *v.* Fulton, 3 Gratt. 193. And see Barfield *v.* Price, 40 Cal. 535.

8 Griffith *v.* Townley, 69 Mo. 13; 33 Am. Rep. 476.

9 Green *v.* Morris etc. R. R. Co. 12 N. J. Eq. 165; Longhurst *v.* Star Ins. Co. 19 Iowa, 364; Woodbury etc. Bank *v.* Charter Oak Ins. Co. 31 Conn. 517; Rogers *v.* Atkinson, 1 Ga. 12.

10 Burkhauser *v.* Schmitt, 45 Wis. 316; 30 Am. Rep. 740.

11 Dill *v.* Shahan, 25 Ala. 694.

12 Rosevelt *v.* Fulton, 2 Cowen, 129; Goodell *v.* Field, 15 Vt. 676; Rogers *v.* Atkinson, 1 Ga. 12; Baptiste *v.* Peters, 51 Ala. 158.

13 Rogers *v.* Atkinson, 1 Ga. 12; and see Griswold *v.* Smith, 10 Vt. 452; Collier *v.* Lanier, 1 Ga. 238.

14 Chamberlaine *v.* Marsh, 6 Munf. 283.

15 Leas *v.* Eidson, 9 Gratt. 277. See Hill *v.* Bush, 19 Ark. 522; Griswold *v.* Smith, 10 Vt. 452.

16 Hill *v.* Buckley, 17 Ves. 394; and see § 383, *ante*.

17 Quesuel *v.* Woodlief, 2 Hen. & M. 173, note; Darling *v.* Osborne, 51 Vt. 148; Paine *v.* Upton, 87 N. Y. 327; 41 Am. Rep. 371.

18 Paine *v.* Upton, 87 N. Y. 327; 41 Am. Rep. 371.

19 Baltimore etc. Land Soc. *v.* Smith, 54 Md. 187; 39 Am. Rep. 374; and see Marbury *v.* Stonestreet, 1 Md. 147.

20 Rich *v.* Ferguson, 45 Tex. 396; and see Joliffe v. Hite, 1 Call, 262; Vender *v.* Fonda, 3 Paige, 94; Smith *v.* Fly, 24 Tex. 345; Buck *v.* McCoughtry, 5 Mon. 210; Moses *v.* Wallace, 7 Lea, 416. The fact that a spring represented to be upon the land purchased, which from its location and value could not have formed a decided inducement to the purchase, is found to be without the limits of the purchase is not sufficient to authorize a rescission of the contract: Winston *v.* Gwathmey, 8 Mon. B. 19.

21 Nelson *v.* Carrington, 4 Munf. 332; and see Failing *v.* Osborne, 2 Oreg. 498; Miller *v.* Bently, 5 Sneed, 672; Myers *v.* Lindsay, 5 Lea, 334.

§ 389. Fraud, etc.—It is well settled that a court of equity may rescind a conveyance of land, or a contract therefor, which has been procured by fraud or false representations, when a proper case for the court is presented.[1] But the equity of a bill to rescind a contract on this ground is much weakened by delay in bringing suit.[2] A party who would rescind a contract on the ground of fraud must offer to do so in a reasonable time after the fraud is discovered.[3] Fraudulent representation and concealment by the vendor as to the nature, quality, and quantity of the land will entitle the vendee to a rescission of the contract.[4] And so as to false representations or concealment by the vendor relative to his title.[5] It is held that the misrepresentation which will avoid a contract of sale must have been as to some material fact, it must have misled the purchaser to his injury, and it must have been falsely and fraudulently made.[6] And representations in the sale of land, though false, made in respect to a subject which is mere matter of opinion, as, for instance, the quantity of wood on the land, is held not to constitute ground for the rescission of the contract.[7] On the other hand, it is held that actual misrepresentation of the quantity of lands, though not fraudulently made, if the mistake essentially affects the contract, equity will rescind it.[8] But if the purchaser knows the representation to be false, it cannot be said to influence his conduct, and he has no right to make complaint under the circumstances.[9] And a sale though founded on the false representations of the vendor cannot be for that cause wholly rescinded, if prior to the completion of the sale the vendee had become acquainted with all the facts, and yet confirmed the bargain.[10] A contract for the sale of lands may be avoided for the misrepresentation of the vendee, as well as that of the vendor.[11] Thus, where the vendee applied to the vendor to purchase a lot of wild land, and represented to him that it was worth nothing except for the purposes of a sheep-pasture, when he knew

there was a valuable mine on the lot, of which the vendor was ignorant, it was held that this frand would avoid the purchase.[12] It is always competent to show misrepresentation and fraud by parol evidence.[13]

1 Woodman *v.* Freeman, 25 Me. 531; Green *v.* Chandler, 25 Tex. 149; Hickey *v.* Drake, 47 Mo. 369; Smith *v.* Robertson, 23 Ala. 312; Stark *v.* Henderson, 30 Ala. 438; Griffin *v.* sketoe, 30 Ga. 300; Evans *v.* Bicknell, 6 Ves. 174, 182. A contract or conveyance will not in general be set aside for fraud, except at the option of the party defrauded: Jones *v.* Hill, 9 Bush, 692; Ayers *v.* Hewett, 19 Me. 281.

2 Foxworth *v.* Bullock, 44 Miss. 457; and see Krutz *v.* Craig, 53 Ind. 561; Baker *v.* Read, 18 Beav. 398; Longworth *v.* Hunt, 11 Ohio St. 194; Clegg *v.* Edmondson, 8 De Gex, M. & G. 807.

3 See Davis *v.* Tarwater, 15 Ark. 286; Obert *v.* Obert, 12 N. J. Eq. 423; Foster *v.* Gressett, 29 Ala. 393; Walsham *v.* Stainton, 1 De Gex, J. & S. 678; Myers *v.* O'Hanlon, 12 Rich. 196. And the proof of fraud must be full, clear, and explicit: Rupart *v.* Dunn, 1 Rich. 101.

4 Thomas *v.* Beebe, 25 N. Y. 244; Smith *v.* Robertson, 23 Ala. 312; Lowry *v.* McLane, 3 Grant Cas. 333; Parret *v.* Shaubhut, 5 Minn. 323; Martin *v.* Jordon, 60 Me. 531; Mitchell *v.* Moore, 24 Iowa, 394; Boyce *v.* Grundy, 3 Peters, 210; Camp *v.* Camp, 2 Ala. 632; Underwood *v.* West, 43 Ill. 403; Perkins *v.* Rice, 6 Litt. 218. Compare Peck *v.* Bullard, 2 Humph. 41.

5 Green *v.* Chandler, 25 Tex. 148; Crutchfield *v.* Danilly, 16 Ga. 432, Prout *v.* Roberts, 32 Ala. 427; Smith *v.* Robertson, 23 Ala. 312; Kennedy *v.* Johnson, 2 Bibb, 12; Gill *v.* Corbin, 4 Marsh. J. J. 392; Carr *v.* Callaghan, 3 Litt. 365; Gray *v.* Bartlett, 20 Pick. 186. Compare Hastings *v.* O'Donnell, 40 Cal. 148.

6 Pratt *v.* Philbrook, 33 Me. 17; Brown *v.* Blunt, 72 Me. 415; Wilson *v.* Strayhorn, 26 Ark. 28; and see Grider *v.* Clopton, 27 Ark. 244; Crown *v.* Carriger, 66 Ala. 590.

7 Longshore *v.* Jack, 30 Iowa, 298; Crown *v.* Carriger, 66 Ala. 590; Curry *v.* Keyser, 39 Ind. 214; Holbrook *v.* Connor, 60 Me. 578; 11 Am. Rep. 212; Drake *v.* Latham, 50 Ill. 270; Mooney *v.* Miller, 102 Mass. 217; Morrison *v.* Koch, 32 Wis. 254; Davis *v.* Betz, 66 Ala. 206. Compare Martin *v.* Jordon, 60 Me. 531.

8 Belknap *v.* Sealey, 14 N. Y. 143; and see Rogers *v.* Mitchell, 42 N. H. 158; Hammond *v.* Pennock, 5 Lans. 356; Hough *v.* Richardson, 3 Story, 659; Smith *v.* Babcock, 2 Wood. & M. 216; Graves *v.* Lebanon National Bank, 10 Bush, 23; 19 Am. Rep. 60; Bankhead *v.* Alloway, 6 Cold. 56; Kennedy *v.* Panama etc. Co. L. R. 2 Q. B. 580; Reynell *v.* Sprye, 1 De Gex, M. & G. 709.

9 Ely *v.* Stewart, 2 Md. 408; and see Hough *v.* Richardson 3 Story, 659; Clapham *v.* Shilletts, 7 Beav. 149; Gordon *v.* Parmelee, 2 Allen, 214; Stitt *v.* Little, 63 N. Y. 427; Bowman *v.* Carithers, 40 Ind. 60.

10 Pratt *v.* Philbrook, 33 Me. 17. If the vendee, with full knowledge that he has been defrauded, proceeds to execute the contract on his part by payments of portions of the purchase-money, it is a waiver of the fraud, and he is not subsequently entitled to a rescission of the contract: Knuckolls *v.* Lea, 10 Humph. 577; and see Griggs *v.* Woodruff, 14 Ala. 9; Burr *v.* Todd, 41 Pa. St. 206; Yeates *v.* Prior, 6 Ark. 58.

11 Masterton *v.* Beers, 6 Robt. 368; Warner *v.* Daniels, 1 Wood. & M. 90; Bull *v.* Bell, 4 Wis. 54; Pinckard *v.* Woods, 8 Gratt. 140; Foxworth *v.* Bullock, 44 Miss. 457.

12 Livingston *v.* Peru Iron Co. 2 Paige, 390; and see Bowman *v.*

Bates, 2 Bibb, 47; Smith v. Beatty, 2 Ired. Eq. 456. But compare Fox v. Macreth, 2 Brown Ch. 420; Harris v. Tyson, 24 Pa. St. 347. But the fact that the vendee discovered a valuable mine on the land soon after the purchase is no ground for a rescission of the sale, in the absence of proof that he knew the fact before the purchase and suppressed it: Bean v. Valle, 2 Mo. 126.

13 Rogers v. Hadley, 2 Hurl. & C. 227; Robinson v. Lord Vernon, 7 Com. B. N. S. 231; Chambers v. Livermore, 15 Mich. 381; Best v. Stow, 2 Sand. Ch. 300; Phyfe v. Wardell, 2 Edw. Ch. 47; and see Wilson v. Watts, 9 Md. 356; Hatson v. Browne, 9 Com. B. N. S. 442.

§ 390. Incapacity of party.—Constructive fraud, consisting in the personal incapacity of one of the parties, may constitute ground for avoiding the contract.[1] Thus, contracts for the purchase and sale of land, entered into by idiots, lunatics, and other persons *non compos mentis*, may generally be avoided upon the ground of a want of rational and deliberate consent.[2] A contract of this kind made by one adjudged a lunatic is absolutely void.[3] So equity will not lend its aid to enforce a deed or contract obtained from a man when intoxicated;[4] but, on the other hand, will rescind the contract.[5] And a contract may be avoided by the legal representatives of a party thereto, on the ground of his having been drunk when it was made, though such drunkenness was not occasioned by the procurement of the other party.[6] But in such case, the intoxication must have been so excessive as to deprive the party of the use of his reason and understanding.[7] The fact that the vendee was drunk at the time, and not in a situation to judge correctly or act prudently, will not avail him to avoid the contract, unless he can show that it was procured by the contrivance of the vendor, or that an unfair advantage was taken of his situation.[8] So the mere fact that a person is of weak understanding, if there be no fraud, or no undue advantage be taken, is not of itself sufficient ground for setting aside the contract.[9] Much less will a contract be set aside merely because the party was illiterate, unless he has been grossly deceived or fraudulently imposed upon.[10] Whenever a fiduciary relation exists between the parties, such as the relation of parent and child, guardian and

ward,. trustee and *cestui que trust*, etc., whereby trust and confidence are reposed on one side and influence and control are exercised on the other, equity requires that the confidence which has been reposed be not betrayed;[11] and a person availing himself of his position of confidence will not be permitted to retain the advantage although the transaction could not have been impeached if no such confidential relation had existed.[12] Where a person of weak intellect was overreached in an exchange of lands by one in whom he confided, it was held that the contract should be rescinded, and the parties placed in *statu quo*.[13] So where one induced his nephew, an ignorant young man, to accept land worth little more than a third of the amount due him, and to give a discharge of the debt, it was held that fraud would be presumed, and the conveyance was set aside.[14] The burden of proof rests upon the party who fills the position of active confidence, to show that absolute fairness, adequacy, and equity characterized the transaction.[15]

1 See Dent *v.* Bennett, 5 Mylne & C. 277; Huguenin *v.* Basely, 14 Ves. 273; Niell *v.* Morley, 9 Ves. 478; Street *v.* Goss, 62 Mo. 228; Conant *v.* Jackson, 16 Vt. 335.

2 Beverley's Case, 4 Coke, 124; Hadley *v.* Latimer, 3 Yerg. 537; Davis *v.* McNally, 5 Sneed, 583; Elliott *v.* Ince, 7 De Gex, M. & G. 475; Jacobs *v.* Richards, 18 Beav. 300; Stikeman *v.* Dawson, 1 De Gex & S. 105; Manning *v.* Gill, L. R. 13 Eq. 485; Garrow *v.* Brown, 1 Winst. Eq. 46; Shaw *v.* Dixon, 6 Bush, 644. An infant who, by a false and fraudulent representation that he is of full age, induces a man to enter into a contract with him will be bound in equity: Hannah *v.* Hodgson, 30 Beav. 23; Ex parte Taylor, 8 De Gex, M. & G. 254.

3 Fitzhugh *v.* Wilcox, 12 Barb. 235. Compare Carr *v.* Holliday, 5 Ired. Eq. 167; Noel *v.* Karper, 53 Pa. St. 97; In re Gaugmere, 14 Pa. St. 417. Contracts of a lunatic made before office found are not void but voidable, while those made afterwards are absolutely void: Wait *v.* Maxwell, 5 Pick. 217; Pearl *v.* McDowell, 3 Marsh. J. J. 658; Jackson *v.* Gardner, 9 Cowen, 552; Matter of Beckwith, 3 Hun, 443.

4 Conant *v.* Jackson, 16 Vt. 335; and see Gore *v.* Gibson, 13 Mees. & W. 623; Dorr *v.* Munsell, 13 Johns. 430; Prentice *v.* Achorn, 2 Paige, 30; Calloway, *v.* Witherspoon, 5 Ired. Eq. 128; Cooke *v.* Clayworth, 18 Ves. 12.

5 Calloway *v.* Witherspoon, 5 Ired. Eq. 128. The court will rescind the contract, not on account of his drunkenness, but of the fraud: Calloway *v.* Witherspoon, 5 Ired. Eq. 128; Cooke *v.* Clayworth, 18 Ves. 12; and see Shaw *v.* Thackray, 17 Jur. 1945; 23 Eng. L. & Eq. 18.

6 Wigglesworth *v.* Steers, 1 Hen. & M. 70; Reinicker *v.* Smith, 2 Har. & J. 421.

7 Dunn *v.* Amos, 14 Wis. 106; Willcox *v.* Jackson, 51 Iowa, 208; Tay-

lor *v.* Patrick, 1 Bibb, 168; Belcher *v.* Belcher, 10 Yerg. 121; Hutchinson *v.* Brown, 1 Clarke Ch. 408; and see Peck *v.* Cary, 27 N. Y. 9; Burns *v.* O'Rourke, 5 Robt. 649.

8 Rodman *v.* Zilley, 1 N. J. Eq. 320.

9 Young *v.* Stevens, 48 N. H. 133; 2 Am. Rep. 202; Mann *v.* Betterly, 21 Vt. 326; Davis *v.* McNalley, 5 Sneed, 583; Ball *v.* Mannin, 3 Bligh N. S. 1.

10 Rodman *v.* Zilley, 1 N. J. Eq. 320; and see Cain *v.* Warford, 33 Md. 23; Beverly *v.* Walden, 20 Gratt. 147; Alman *v.* Stout, 42 Pa. St. 114.

11 Lee *v.* Pearce, 68 N. C. 76; Dickinson *v.* Bradford, 59 Ala. 581; 31 Am. Rep. 23; Hoxie *v.* Price, 31 Wis. 82; Kelly *v.* McGuire, 15 Ark. 555; Fisher *v.* Budlong, 10 R. I. 525; Cowee *v.* Cornell, 75 N. Y. 91; 31 Am. Rep. 428; Highberger *v.* Stiffler, 21 Md. 338; Martin *v.* Martin, 35 Ala. 560; Beam *v.* Macomber, 33 Mich. 127; Darlington's Appeal, 86 Pa. St. 512; 27 Am. Rep. 726; Mount *v.* Tappey, 7 Bush, 617; Aaron *v.* Mendel, 78 Ky. 427, 430; Boyd *v.* De La Montagnie, 73 N. Y. 498; 29 Am. Rep. 197; Smith *v.* Kay, 7 H. L. Cas. 750; Rhodes *v.* Bate, Law R. 1 Ch. App. 61; Ranken *v.* Patton, 65 Mo. 378; See Cleland *v.* Fish, 43 Ill. 282.

12 Tate *v.* Williamson, Law R. 2 Ch. App. 61; White *v.* Smith, 51 Ala. 405.

13 Bunch *v.* Shannon, 46 Miss. 525.

14 Hall *v.* Perkins, 3 Wend. 626.

15 Hoghton *v.* Hoghton, 15 Beav. 288; Smith *v.* Kay, 7 H. L. Cas. 750; Bradshaw *v.* Yates, 67 Mo. 221. In cases of confidential relations, it is not necessary to show that fraud or imposition was practiced upon him who bestows the confidence, but simply that such relation existed at the time the transaction was entered into. When this is done, the burden of showing the fairness of the transaction rests on him who claims under it: Street *v.* Goss, 62 Mo. 229; Yosti *v.* Loughran, 49 Mo. 594; and see Waddell *v.* Lanier, 62 Ala. 347; Ferguson *v.* Lowery, 54 Ala. 510; 25 Am. Rep. 718. A contract between an administrator and one of his distributees, by which the latter sells the former all his interest in the estate, is presumptively void: Williams *v.* Powell, 66 Ala. 20; 41 Am. Rep. 742. See also, Pierce *v.* Pierce, 71 N. Y. 154; 27 Am. Rep. 22; Berkmeyer *v.* Killerman, 32 Ohio St. 239; 30 Am. Rep. 577.

§ 391. Inadequacy and excess of consideration.—Mere inadequacy of consideration is not, of itself, usually regarded as a distinct and independent ground for avoiding a contract.[1] But it is always a material circumstance to be considered, along with other circumstances existing in a case, conducing to show that it would be inequitable to enforce the contract.[2] And where the inadequacy of consideration is such as to shock the moral sense of mankind, it is in itself evidence of fraud, and affords sufficient ground for canceling the contract.[3] Such inadequacy, in general, raises a conclusive presumption that an undue advantage has been taken of the ignorance, the weakness, or the necessity and distress of the vendor, and this imposes upon the vendee the

necessity of removing this violent presumption by the clearest evidence of the fairness of his conduct.[4] Fraud in the vendee is of the essence of the objection to the contract in such a case.[5] And equity will especially interfere, where a confidential relation exists between the parties and this confidence is abused, or the influence naturally growing out of that confidence is exerted to obtain an advantage at the expense of the confiding party.[6] So inadequacy of price alone, when such as to show that the vendor did not understand the contract, or was induced to make it to escape oppression, will avoid the sale.[7] But generally speaking, in the absence of mistake, fraud, or want of capacity satisfactorially made out, equity will not relieve a person from the consequences of an improvident sale of his land.[8] Thus, a sale of a reversion in real estate, by a young man who had just attained his majority, there being no fraud or imposition on the part of the purchaser, and no confidential relations between the parties, will not be set aside for mere inadequacy of price.[9] In some cases a vendee may obtain redress where he pays or agrees to pay an excessive consideration.[10] But it is said that the excess must be such as would shock all men of common intelligence at first blush, and be itself a proof of fraud or management on the part of the vendor.[11]

1 Osgood *v.* Franklin, 2 Johns. Ch. 1; 14 Johns. 527; Dunn *v.* Chambers, 4 Barb. 376; Borell *v.* Dann, 2 Hare, 440; Garnett *v.* Macon, 2 Brock. 185, 246; Ready *v.* Noakes, 29 N. J. Eq. 497; Harrison *v.* Guest, 8 H. L. Cas. 481; 6 De Gex, M. & G. 434; Gulf R. R. Co. *v.* Commissioners etc. 12 Kan. 482; Lee *v.* Kirby, 104 Mass. 420; Slater *v.* Maxwell, 6 Wall. 268; Cribbins *v.* Markwood, 13 Gratt. 495.

2 Hale *v.* Wilkinson, 21 Gratt. 75; Beard *v.* Campbell, 2 Marsh. A. K. 125; 12 Am. Dec. 362; Seymour *v.* Delancey, 6 Johns. Ch. 222; Mann *v.* Betterley, 21 Vt. 326; Lester *v.* Mahan, 25 Ala. 445; and see Booten *v.* Scheffer, 21 Gratt. 495; Chambers *v.* Livermore, 15 Mich. 381.

3 Mayo *v.* Carrington, 19 Gratt. 74; Hale *v.* Wilkinson, 21 Gratt. 75; Saltonstall *v.* Gordon, 33 Ala. 149; Coles *v.* Trecothick, 9 Ves. 234, 246; Lowther *v.* Lowther, 13 Ves. 95; Wintermute *v.* Snyder, 3 N. J. Eq. 489. Inadequacy of price which will operate to prevent the specific performance of a contract must be inadequacy at the time of the sale: Hale *v.* Wilkinson, 21 Gratt. 75; Judge *v.* Wilkins, 19 Ala. 765.

4 Butler *v.* Haskell, 4 Desaus. Eq. 651; and see Lowther *v.* Lowther, 13 Ves. 95; Wormack *v.* Rogers, 9 Ga. 60; Gulf R. R. Co. *v.* Commissioners etc. 12 Kan. 482; Deane *v.* Rastron, 1 Anstr. 64.

5 Borell *v.* Dann, 2 Hare, 440; Ready *v.* Noakes, 29 N. J. Eq. 449.

6 Tate *v.* Williamson, Law R. 1 Eq. 528; S. C. aff'd, Law R. 2 Ch. App. 55; Berkmeyer *v.* Killerman, 32 Ohio St. 233; 30 Am. Rep. 577; Jacox *v.* Jacox, 40 Mich. 473; 29 Am. Rep. 547; Pierce *v.* Pierce, 71 N. Y. 151; 27 Am. Rep. 22; Cook *v.* Cole, 6 N. J. Eq. 522.

7 Cruise *v.* Christopher, 5 Dana, 182; Murray *v.* Palmer, 2 Schoales & L. 474; Pickett *v.* Loggon, 14 Ves. 215; and see Lester *v.* Mahan, 25 Ala. 445; Tate *v.* Williamson, Law R. 1 Eq. 528; Law R. 2 Ch. App. 55; McKinney *v.* Pinchard, 2 Leigh, 149.

8 Thompson *v.* Gossitt, 23 Ark. 175; Dunn *v.* Chambers, 4 Barb. 376; Parmelee *v.* Cameron, 41 N. Y. 332; Barker *v.* Anderson, 35 Ill. 68.

9 Cribbins *v.* Markwood, 13 Gratt. 495; and see Thompson *v.* Gossitt, 23 Ark. 175; Harrison *v.* Guest, 8 H. L. Cas. 481; 35 Eng. L. & Eq. 487.

10 See Hough *v.* Hunt, 2 Ohio, 495, 502; Cathcart *v.* Robinson, 5 Peters, 264.

11 Ex parte Allen, Petitioner, 15 Mass. 58, 65; compare Park *v.* Johnson, 7 Allen, 378; White *v.* McGannon, 29 Gratt. 511.

§ 392. Specific performance.—Specific performance is a mode of redress in equity, grounded upon the impracticability or inadequacy of legal remedies to compensate for the damages which the party seeking it will suffer by the default of the other party in keeping his bargain.[1] If the party can be indemnified in damages, courts of equity will not, unless other grounds of equitable relief be involved, accord this remedy.[2] The remedy is not a matter of absolute right in the party, but of sound discretion in the court;[3] the court holds it in judicial discretion, controlled by principles of equity and justice.[4] But where a contract for the sale of land is fair, certain, reasonable, and capable of being performed, it is almost a matter of course for a court of equity to decree a specific performance thereof;[5] for the value of the land, in the eyes of the purchaser, may depend upon circumstances of position, neighborhood, soil, and in general, upon considerations of taste or fancy, for which damages are no compensation.[6] The precise form in which the contract is expressed is immaterial, with respect to the right of specific performance;[7] but it must possess, in substance, the qualities and requisites of a valid contract.[8] The bargain must have been completely determined between the parties, and its terms definitely ascertained.[9] So it must be mutual, and the tie reciprocal,[10]

and be founded upon an adequate consideration;[11] otherwise, a court of equity will not enforce a performance.[12] If the land which is the subject of the contract is within the State, a bill for specific performance may be maintained, although the vendor is out of the jurisdiction.[13] So if the vendor be within the jurisdiction of the court, a contract made by him for the sale of lands lying in another State may be decreed.[14] The rule appears to be, that specific performance will be decreed whenever the parties, or the subject-matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court.[15]

1 Brown *v.* Brown, 33 N. J. Eq. 654.

2 Wordsworth *v.* Manning, 4 Md. 59; McLane *v.* White, 5 Minn. 178; Marble Co. *v.* Ripley, 10 Wall. 339; Barnes *v.* Barnes, 65 N. C. 261; Penna. Coal Co. *v.* Delaware etc. Canal Co. 31 N. Y. 91. Compare Crary *v.* Smith, 2 N. Y. 60; White *v.* Butcher, 6 Jones Eq. 231; Richmond *v.* Dubuque etc. R. R. Co. 33 Iowa, 422; Eastern etc. Railway Co. *v.* Hawkes, 5 H. L. Cas. 331; 35 Eng. L. & Eq. 8.

3 Smoot *v.* Rea, 19 Md. 398; Rust *v.* Conrad, 47 Mich. 449; Pickering *v.* Pickering, 38 N. H. 400; Blackwilder *v.* Loveless, 21 Ala. 371; Humbard *v.* Humbard, 3 Head, 100; Shriver *v.* Seiss, 49 Md. 383; Fish *v.* Lightner, 44 Mo. 268; Quinn *v.* Roath, 37 Conn. 16; McComas *v.* Easley, 21 Gratt. 23; Hale *v.* Wilkinson, 21 Gratt. 75; Sherman *v.* Wright, 49 N. Y. 227; Thurston *v.* Arnold, 43 Iowa, 41; Mitchell *v.* Steinmetz, 97 Pa. St. 254; and see Grier *v.* Rhyne, 69 N. C. 347; Millard *v.* Merwin, 23 N. J. Eq. 419; Hays *v.* Harmony Grove Cemetery, 108 Mass. 400; McNamee *v.* Withers, 37 Md. 171.

4 Brown *v.* Brown, 33 N. J. Eq. 654; Radcliffe *v.* Warrington, 12 Ves. 332; Pigg *v.* Corder, 12 Leigh, 69; Pulliam *v.* Owen, 25 Ala. 492; Rogers *v.* Saunders, 16 Me. 92; St. John *v.* Benedict, 6 Johns. Ch. 111; Leigh *v.* Crump, 1 Ired. Eq. 299; Gillis *v.* Hall, 2 Brews. 342; Hudson *v.* King, 2 Heisk. 560; Aston *v.* Robinson, 49 Miss. 343; Lowry *v.* Buffington, 6 W. Va. 249; Plummer *v.* Keppler, 26 N. J. Eq. 441; Fish *v.* Leser, 69 Ill. 394; Abbott *v.* L'Hommedieu, 10 W. Va. 677. The court cannot alter the contract and then enforce it: Grey *v.* Tubbs, 43 Cal. 359; Farwell *v.* Meyer, 35 Ill. 40. And specific performance will not be decreed if there was a subsequent agreement by parol to waive it and substitute a new one: Ryno *v.* Darby, 20 N. J. Eq. 231.

5 Schroeppel *v.* Hopper, 40 Barb. 425; Old Colony R. R. Co. *v.* Evans, 6 Gray, 36; Williams *v.* McGuire, 60 Mo. 254; Brown *v.* Crane, 47 Ga. 483; Johnson *v.* Rickett, 5 Cal. 218; Chance *v.* Beall, 21 Ga. 113; Hopper *v.* Hopper, 16 N. J. Eq. 147; Rogers *v.* Saunders, 16 Me. 92; St. Paul Division *v.* Brown, 9 Minn. 157. Equity regards a contract for land of which a specific execution will be decreed, for most purposes, as if it had been specifically executed: Huffman *v.* Hummer, 17 N. J. Eq. 263. Specific performance of an antenuptial agreement for the use of land may be enforced in favor of a husband against his wife: Stratton *v.* Stratton, 58 N. H. 473.

6 M'Garvey *v.* Hall, 23 Cal. 140; Ensign *v.* Kellogg, 4 Pick. 1; Brown *v.* Brown, 33 N. J. Eq. 654; Willard *v.* Tayloe, 8 Wall. 557; Bogan *v.* Daughdrill, 51 Ala. 312; Adderley *v.* Dixon, 1 Sim. & St. 607; Harnett *v.* Yeilding, 2 Schoales & L. 553.

7 See Hooker *v.* Pynchon, 8 Gray, 550; Bull *v.* Bell, 4 Wis. 54; Dooley *v.* Watson, 1 Gray, 414; Clark *v.* Burnham, 2 Story, 1; Hutton *v.* Williams, 35 Ala. 503; Bagden *v.* Bradbear, 12 Ves. 466; Hull *v.* Sturdivant, 46 Me. 34; Peters *v.* Phillips, 19 Tex. 70; Lerned *v.* Wannemacher, 9 Allen, 416.

8 See Semmes *v.* Worthington, 38 Md. 298; Rust *v.* Conrad, 47 Mich. 449; Minturn *v.* Baylis, 33 Cal. 129; Ralls *v.* Ralls, 82 Ill. 243; Galbraith *v.* Galbraith, 5 Kan. 402; Chandler *v.* Johnson, 39 Ga. 85; Caton *v.* Caton, Law R. 1 Ch. App. 137.

9 Ridgway *v.* Wharton, 6 H. L. Cas. 238; Brown *v.* Brown, 33 N. J. Eq. 650; Brown *v.* Lord, 7 Oreg. 302; Barnett *v.* Nichols, 55 Miss. 622; Hammer *v.* McEldowney, 46 Pa. St. 334; Jordan *v.* Deaton, 23 Ark. 74; Patrick *v.* Horton, 3 W. Va. 23; Soles *v.* Hickman, 20 Pa. St. 180; Brown *v.* Brown, 47 Mich. 378; Bracken *v.* Hambrick, 25 Tex. 408; Myers *v.* Forbes, 24 Md. 598; Jordon *v.* Fay, 40 Me. 130. And only those contracts which are fair, just, and reasonable will be specifically enforced: Smith *v.* Crandall, 20 Md. 482; Morrison *v.* Peay, 21 Ark. 110; Reed *v.* Radmun, 5 Ind. 409; Chubb *v.* Peckham, 13 N. J. Eq. 207; Huntington *v.* Rogers, 9 Ohio St. 511; Davidson *v.* Little, 22 Pa. St. 245; Smith *v.* Wood, 12 Wis. 382.

10 Benedict *v.* Lynch, 1 Johns. Ch. 370; Jones *v.* Noble, 3 Bush, 694; Tarr *v.* Scott, 4 Brews. 49; Marble Co. *v.* Ripley, 10 Wall. 339; Maynard *v.* Brown, 41 Mich. 298; Bodine *v.* Glading, 21 Pa. St. 50; Duvall *v.* Myers, 2 Md. Ch. 401; Reese *v.* Reese, 41 Md. 554. It will be remembered, however, that a written agreement concerning lands may be enforced in equity, although binding only on the party to be charged: Rogers *v.* Saunders, 16 Me. 92; Lord Ormond *v.* Anderson, 2 Ball & B. 363; and see § 377, *ante*; White *v.* Schuyler, 31 How. Pr. 38; 1 Abb. Pr. N. S. 300; Muller *v.* Vettel, 25 How. Pr. 350; Seton *v.* Slade, 7 Ves. 265.

11 Andrews *v.* Andrews, 28 Ala. 432; Vasser *v.* Vasser, 23 Miss. 378; Bayler *v.* Commonwealth, 40 Pa. St. 37; Holg *v.* Adrian College, 83 Ill. 267; Peacock *v.* Monk, 1 Madd. 413; Cochrane *v.* Willis, 34 Beav. 359. The contract must be founded upon a valuable, as distinguished from a merely good or moral, consideration: Wallace *v.* Rappleye, 103 Ill. 229.

12 Ewing *v.* Gordon, 49 N. H. 444; Viele *v.* Troy etc. R. R. Co. 21 Barb. 381. See Harrison *v.* Town, 17 Mo. 237.

13 Rourke *v.* McLaughlin, 38 Cal. 196; Gartrell *v.* Stafford, 12 Neb. 550; and see Matteson *v.* Scofield, 27 Wis. 671.

14 Myres *v.* Demler, 4 Daly, 343; Olney *v.* Eaton, 66 Mo. 563; Newton *v.* Bronson, 13 N. Y. 587; Gardner *v.* Ogden, 22 N. Y. 327; Davis *v.* Parker, 14 Allen, 94; Penn *v.* Baltimore, 1 Ves. Sr. 444; Massie *v.* Watts, 6 Cranch, 148, 158. Compare Penn *v.* Hayward, 14 Ohio St. 302. Specific performance of a contract to convey land in Massachusetts may be decreed against an inhabitant of another State, who has been personally served with notice in the former State: Dooley *v.* Watson, 1 Gray, 414.

15 Rourke *v.* McLaughlin, 38 Cal. 196.

§ 393. Vendor's lien.—It is an equitable doctrine, well established in England, and generally recognized in this country, that, in the absence of an agreement express or implied to the contrary, the vendor of lands has a lien on them for the unpaid purchase-money.[1] It is an equitable right to be resorted to in case the purchase-money

is not paid,[2] and it will be enforced in favor of any subsequent holder who becomes rightfully the owner of the claim or demand.[3] It attaches where the sale is by operation of law, as well as where it is by voluntary contract,[4] and whether the estate has been conveyed to the vendor, or is only contracted to be conveyed.[5] And it exists not only against the vendee and his heirs, and other privies in estate,[6] but also against all subsequent purchasers,[7] except purchasers for value, in good faith, without notice of the original vendor's equity.[8] And where a recorded deed recited that the consideration "was secured" to be paid by the grantee, it was held that one who claimed title under him was thereby notified that the purchase-money had not been paid, and he was put on inquiry, and could not take the land divested of the vendor's lien.[9] And generally, a purchaser who at the time of sale is in possession of facts which would put an ordinarily prudent man upon inquiry, as to the existence of a vendor's lien upon the property purchased, will be held to take subject to the lien.[10] And no one is protected as a *bona fide* purchaser, although he purchases without notice, if he pays after notice.[11] In order that a person may be protected as a *bona fide* purchaser for value without notice against a prior equity or conveyance, it must appear that he is the purchaser of the legal as distinguished from an equitable title;[12] that he purchased the same in good faith;[13] that he parted with value as a consideration therefor, by paying money or other thing of value, assuming a liability or incurring an injury;[14] and that he had no notice, and knew no fact sufficient to put him on inquiry, either at the time of his purchase or at or before the time he paid the purchase-money or otherwise parted with such value.[15]

1 Mackreth *v.* Symons, 15 Ves. 327; Burns *v.* Taylor, 23 Ala. 255; Burks *v.* Watson, 48 Tex. 107; Anderson *v.* Griffith, 66 Mo. 44; Magruder *v.* Campbell, 40 Ala. 611; Yancey *v.* Mauck, 15 Gratt. 300; Allen *v.* Loring, 34 Iowa, 499; Herbert *v.* Scofield, 9 N. J. Eq. 492; Davis *v.* Lamb, 30 Mo. 441; Jackson *v.* McChesney, 7 Cowen, 360; 17 Am. Dec. 520; Dubois *v.* Hall, 43 Barb. 26; Hall *v.* Jones, 21 Md. 439;

Servis *v.* Beatty, 32 Miss. 52; Nell *v.* Kinney, 11 Ohio St. 58; Bayley *v.* Greenleaf, 7 Wheat. 46. In some of the States the doctrine as to equitable liens has been wholly rejected: see Edminster *v.* Higgins, 6 Neb. 265; Simpson *v.* Mundee, 3 Kan. 173; Greeno *v.* Barnard, 18 Kan. 518; Hepburn *v.* Snyder, 3 Pa. St. 72; Stephen's Appeal, 38 Pa. St. 9; Heist *v.* Baker, 49 Pa. St. 9; Ahrend *v.* Odiorne, 118 Mass. 261; 19 Am. Rep. 449; Philbrook *v.* Delano, 29 Me. 415; in others, the matter is undecided: see Chapman *v.* Beardsley, 31 Conn. 115; Arlin *v.* Brown, 44 N. H. 102. Abolished in Vermont and in Virginia by statute: see Stats. of Vt. 1862, chap. 65, § 33; Yancey *v.* Mauck, 15 Gratt. 300.

2 **Baum *v.* Grigsby, 21 Cal. 172; and see Burns *v.* Taylor, 23 Ala. 255; Buford *v.* McCormick, 57 Ala. 428; Hughes *v.* Kearney, 1 Schoales & L. 135; Keith *v.* Horner, 32 Ill. 524; Allen *v.* Loring, 34 Iowa, 499; Mitchell *v.* Butt, 45 Ga. 162.**

3 Conner *v.* Banks, 18 Ala. 42; Buford *v.* McCormick, 57 Ala. 428. See Murray *v.* Able, 18 Tex. 213; Walker *v.* Williams, 36 Miss. 165; Rakestraw *v.* Hamilton, 14 Iowa, 147. In some of the States it has been held that when notes given for land are transferred, the vendor's lien, if subsisting, also passes to the assignee: see Rakestraw *v.* Hamilton, 14 Iowa, 147; Sloan *v.* Campbell, 71 Mo. 387; 36 Am. Rep. 493; Watt *v.* White, 33 Tex. 421; Lewis *v.* Pusey, 8 Bush, 615; Lagow *v.* Badollet, 1 Blackf. 416; Parker *v.* Kelly, 18 Miss. 184; Honore *v.* Bakewell, 6 Mon. B. 67. On the other hand, it has been held that a vendor's lien is not a matter of transfer, and cannot be assigned, even by express language, with the note taken for the purchase-money: Hecht *v.* Spears, 27 Ark. 229; 11 Am. Rep. 784; and see Gann *v.* Chester, 5 Yerg. 205; Thorpe *v.* Dunlap, 4 Heisk. 674; Webb *v.* Robinson, 14 Ga. 216; Ross *v.* Heintzen, 36 Cal. 313; Hallock *v.* Smith, 3 Barb. 267; Dixon *v.* Dixon, 1 Md. Ch. 220; Keith *v.* Horner, 32 Ill. 526.

4 **Mims *v.* Macon etc. R. R. Co. 3 Ga. 333.**

5 **Hill *v.* Grigsby, 32 Cal. 55.**

6 **Burt *v.* Wilson, 28 Cal. 632; Champion *v.* Brown, 6 Johns. Ch. 398; Carr *v.* Hobbs, 11 Md. 285; Merritt *v.* Wells, 18 Ind. 171; Thornton *v.* Knox, 6 Mon. B. 74; Davis *v.* Pearson, 44 Miss. 508.**

7 **Craft *v.* Russell, 67 Ala. 9.**

8 **Davis *v.* Pearson, 44 Miss. 508; Craft *v.* Russell, 67 Ala. 9; Moore *v.* Anders, 14 Ark. 628.** Vendor's lien may be enforced against married woman: Kent *v.* Gerhard, 12 R. I. 92; 34 Am. Dec. 612; Jackson *v.* Rutledge, 3 Lea, 626; 31 Am. Rep. 655; Cox *v.* Wood, 20 Ind. 54; and see Cushman *v.* Henry, 75 N. Y. 103; 31 Am. Rep. 437; or against a purchaser on an execution sale of land: Rice *v.* Wilburn, 31 Ark. 108; 25 Am. Rep. 549.

9 **Willis *v.* Gay, 48 Tex. 463; 26 Am. Rep. 328.**

10 **Major *v.* Bukley, 51 Mo. 227; Maybin *v.* Kirby, 4 Rich. Eq. 105; Wilson *v.* Miller, 16 Iowa, 111.**

11 **Palmer *v.* Williams, 24 Mich. 328; and see Penfield *v.* Dunbar, 64 Barb. 239.**

12 **Oakley *v.* Bullard, 1 Hemp. 475; Boone *v.* Chiles, 10 Peters, 177; Brown *v.* Wood, 6 Rich. Eq. 155; Ledbetter *v.* Walker, 31 Ala. 175; Mundine *v.* Pitts, 14 Ala. 84; Kearney *v.* Vaughn, 50 Mo. 284; Daniel *v.* Hollingshead, 16 Ga. 190; Iddings *v.* Cairns, 2 Grant Cas. 88.**

13 **Merritt *v.* Northern R. R. Co. 12 Barb. 605; Robson *v.* Osborn, 13 Tex. 298; McCulloch *v.* Doak, 68 N. C. 267.**

14 **Johnson *v.* Graves, 27 Ark. 557; Baze *v.* Arper, 6 Minn. 220; Patten *v.* Moore, 32 N. H. 382; DeMott *v.* Starkey, 3 Barb. 403; Lloyd *v.* Lynch, 28 Pa. St. 419; Campbell *v.* Campbell, 11 N. J. Eq. 268; Johnson *v.* Graves, 27 Ark. 557; Spicer *v.* Waters, 65 Barb. 227; Morrison *v.* Daniels, 35 Ohio St. 406.**

15 Kilcrease *v.* Lum, 36 Miss. 569; Everts *v.* Agnes, 4 Wis. 343; Duncan *v.* Johnson, 13 Ark. 190; Palmer *v.* Williams, 24 Mich. 328; Craft *v.* Russell, 67 Ala. 9; Beckett *v.* Tyler, 3 McAr. 319. A vendor may enforce his equitable lien for the unpaid purchase-money, although an action on the note or debt is barred by the Statutes of Limitation: Ware *v.* Curry, 67 Ala. 274. See § 394, *post*.

§ 394. Waiver of vendor's lien.—A vendor of land has a lien thereon for the unpaid purchase-money as long as he shows no purpose of releasing the land and taking other security;[1] but any act on his part which shows an intention to release the land waives or divests the lien.[2] Taking separate securities for the purchase-money is *prima facie* a waiver of the lien;[3] as, for instance, the taking of a mortgage,[4] or the promissory note of the vendee with security.[5] And it is held that one who takes in payment the secured and indorsed note of a third person, supposed to be good, thereby waives his lien, although it proves worthless.[6] But taking any instrument involving merely the personal liability of the vendee is not a waiver of the vendor's lien.[7] And it has been held that a vendor does not waive his lien by accepting a guaranteed note therefor.[8] Nor is it forfeited by his acceptance of a mortgage for the purchase-price which turns out to be forged.[9] And generally, as against the purchaser, it is held that a vendor does not lose his lien by taking securities known to the purchaser to be worthless, but represented to be good.[10] A receipt of a part of the price of land is held to be no waiver of a vendor's lien for the balance.[11] An abandonment of the vendor's equitable lien, once fairly and voluntarily made, is an abandonment forever.[12]

1 Wasson *v.* Davis, 34 Tex. 167; Bradford *v.* Marvin, 2 Fla. 463.

2 Boss *v.* Eding, 17 Ohio, 500; Moshier *v.* Meek, 80 Ill. 79; Boon *v.* Murphy, 6 Blackf. 272; Griffin *v.* Blanchar, 17 Cal. 70; Selby *v.* Stanley, 4 Minn. 65; Parker *v.* Sewell, 24 Tex. 238; Smith *v.* Smith, 9 Abb. Pr. N. S. 420.

3 Schurz *v.* Stein, 27 Ind. 112; Boyton *v.* Champlain, 42 Ill. 57; Yaryan *v.* Shriner, 26 Ind. 364. Compare Pitts *v.* Parker, 44 Miss. 247; Perry *v.* Grant, 10 R. I. 334; Faver *v.* Robinson, 46 Tex. 204; Hollis *v.* Hollis, 4 Baxt. 524.

4 Pease *v.* Kelly, 3 Oreg. 417; Camden *v.* Vail, 23 Cal. 633; Shelby *v.* Perrin, 13 Tex. 515; Stuart *v.* Harrison, 52 Iowa, 511; Neal *v.* Speigle,

33 Ark. 63. But compare Wasson v. Davis, 34 Tex. 157; DeForest v. Holum, 38 Wis. 516; Anketel v. Converse, 17 Ohio St. 11; Doughaday v. Paine, 6 Minn. 443.

5 Johnson v. Thompson, 4 Marsh. J. J. 330; Vail v. Foster, 4 N. Y. 312; Johnson v. Sugg, 21 Miss. 346; Trustees etc. v. Wright, 11 Ill. 603; Yaryan v. Sluriner, 26 Ind. 364; Carrico v. Merchants' etc. Bank, 33 Md. 235; Stevens v. Rainwater, 4 Mo. App. 292.

6 Kendrick v. Eggleston, 56 Iowa, 128; 41 Am. Rep. 90; and see Hunt v. Waterman, 12 Cal. 301.

7 Gordon v. Green, 1 Johns. Ch. 308; Corlies v. Howland, 26 N. J. Eq. 311; Mauly v. Slason, 21 Vt. 271; Baum v. Grigsby, 21 Cal. 172; Brinckerhoff v. Van Sciven, 4 N. J. Eq. 251; Christian v. Austin, 33 Tex. 340; Denny v. Steakly, 2 Heisk. 156; Skinner v. Purnell, 52 Mo. 97; Dunlap v. Shanklin, 10 W. Va. 662; Manly v. Slason, 21 Vt. 271; Napier v. Jones, 47 Ala. 90; Lavender v. Abbott, 30 Ark. 172.

8 Burrus v. Roulhac, 2 Bush, 39.

9 Fouch v. Wilson, 60 Ind. 64; 28 Am. Rep. 651; and see Tobey v. McAllister, 9 Wis. 463.

10 Tobey v. McAllister, 9 Wis. 463; McDole v. Purdy, 23 Iowa, 277.

11 Tobey v. McAllister, 9 Wis. 463. Compare Codwise v. Taylor, 4 Sneed, 346.

12 Harris v. Harlan, 14 Ind. 433; Camden v. Vail, 23 Cal. 633; Wilson v. Hunter, 30 Ind. 466; and see Avent v. McCorkle, 45 Miss. 221; Mattix v. Weand, 19 Ind. 151. But compare Hollis v. Hollis, 4 Baxt. 524; Cotton v. McGehee, 44 Miss. 510.

§ 395. Enforcement of vendor's lien.—The right to sue at law upon the securities given for the purchase of land, and in equity to enforce the vendor's lien, are distinct and independent rights;[1] and it is held that the vendor can pursue either or both remedies at the same time.[2] It is not necessary that he should first exhaust his remedy at law;[3] nor is he bound to show that the vendee has no personal property subject to execution.[4] Nor is proof of a demand before suit necessary to sustain a suit to enforce a vendor's lien;[5] bringing the suit is held a sufficient demand.[6] It has been held that a vendor's lien cannot be enforced after the bar of the Statute of Limitations has attached to the debt.[7] But the opposite rule is established in Alabama.[8] In proceedings to enforce a vendor's lien, not only the original purchaser, but if the land has been resold by him and the purchaser is dead, the heirs and personal representatives, should all be made parties.[9]

1 Richardson v. Baker, 5 Marsh. J. J. 323; Black v. Hunter, 3 Marsh. J. J. 558; Payne v. Harrell, 40 Miss. 498.

2 Payne v. Harrell, 40 Miss. 498; Pratt v. Clark, 57 Mo. 189; Stewart v. Caldwell, 54 Mo. 536; Chapman v. Lee, 64 Ala. 483. But compare Walker v. Sedgwick, 8 Cal. 398.

3 Mayes v. Hendry, 33 Ark. 240.

4 Smith v. Rowland, 13 Kan. 245; and see Sparks v. Hess, 15 Cal. 186; Harvey v. Kelly, 41 Miss. 490; Hutchinson v. Patrick, 22 Tex. 318; Carpenter v. Mitchell, 54 Ill. 126.

5 Gallagher v. Mars, 50 Cal. 23. A suit to enforce a vendor's lien is not barred by a judgment obtained on the note: Waldron v. Zacharie, 54 Tex. 503.

6 Gallagher v. Mars, 50 Cal. 23.

7 Linthicum v. Tapscott, 28 Ark. 267; Ilett v. Collins, 103 Ill. 74. But see Coldcleugh v. Johnson, 34 Ark. 312.

8 Shorter v. Frazer, 64 Ala. 74; Ware v. Curry, 67 Ala. 275.

9 Mullins v. Sparks, 43 Miss. 129; and see Curtis v. Buckley, 14 Kan. 449; Brightwell v. Hoover, 7 W. Va. 342; Carter v. Ottoway, 46 Tex. 103; Simmons v. Lyles, 27 Gratt. 922. Subsequent purchasers, or encumbrancers not made parties, are not bound by the decree, and their right to redeem is not barred: Haskell v. State, 31 Ark. 91.

§ 396. Vendee's lien.—Where a vendee has paid money upon a contract for the purchase of land, which is rescinded by the fault of the vendor, he has an equitable lien on the land for the reimbursement of the money advanced, similar to that of the vendor for the unpaid purchase-money.[1] The natural equity and intrinsic justice of this lien are said to commend it to the favorable consideration of a court of equity;[2] and it is held to attach even as against a subsequent purchaser with notice.[3] And it is held to be superior to the lien of a judgment against the vendor rendered subsequent to the sale, and before the conveyance of the title.[4] If the vendee has entered into possession of the land and made valuable improvements thereon, his lien attaches for their value;[5] and he should not be compelled to surrender until such value is paid or secured.[6] But the vendor should be allowed a lien for money expended by him in payment of delinquent taxes accruing on the land during the time the vendee had possession and use of the property under the contract.[7]

1 Ludlow v. Gravall, 11 Price, 58; Cator v. Pembroke, 1 Brock. 301; Money v. Dorsey, 7 Smedes & M. 15; and see Burgess v. Wheate, 1 Black. W. 150.

2 Davis v. Heard, 44 Miss 50.

3 Shirley v. Shirley, 7 Blackf. 452; Clark v. Jacobs, 56 How. Pr. 519.
4 Money v. Dorsey, 7 Smedes & M. 15.
5 Griffith v. Depew, 3 Marsh. A. K. 179; and see Ware v. Curry, 67 Ala. 274.
6 Griffith v. Depew, 3 Marsh. A. K. 179.
7 Lillie v. Case, 54 Iowa, 177.

§ 397. Action for purchase-money.—In an ordinary contract for the sale and purchase of lands containing mutual dependent covenants as to the payment of the purchase-money and the conveyance of title, neither party can maintain any action upon it, either at law or in equity, against the other without averring and proving performance on his part, or a readiness and willingness to perform.[1] But where by the terms of the contract the purchase-money is to be paid before the execution of the deed, it is no defense to a suit on a note given for the purchase-money that the deed had not been made or tendered.[2] In such case the covenants are independent, and an action may be maintained for the purchase-money after the time specified for its payment without making or offering to make a deed.[3] The conveyance is not a condition precedent to the right to demand the money.[4] So if it be stipulated that the vendee is to pay a part of the purchase-money at a time specified, and he fails to do so, a tender of conveyance by the vendor is not necessary before bringing an action to recover the sum.[5] If the vendor binds himself to make a deed when the vendee requires it, and after the whole of the purchase-money falls due the vendee offers to pay it and demands a deed, the vendor cannot maintain an action for the money without having tendered a proper conveyance.[6] Where a vendor has agreed to make title upon payment, and the purchase-money is payable in installments falling due at different times, he may sue for any of the installments after they are due except the last without offering to make a deed.[7]

1 Rector v. Price, 6 Ala. 321; Bronghton v. Mitchell, 64 Ala. 210; Thomson v. Smith, 63 N. Y. 301; Kelly v. Mack, 45 Cal. 303; Perry v.

Wheeler, 24 Vt. 286; Stingle v. Hawkins, 8 Blackf. 435; Eckford v. Halbert, 30 Miss. 273; O'Kare v. Kiser, 25 Ind. 163; Holloway v. Davis, Wright, 129; Sorrells v. McHenry, 38 Ark. 127.

2 Broughton v. Mitchell, 64 Ala. 210; Adams v. Wadhams, 40 Barb. 225; Davis v. Heady, 7 Blackf. 261; Paine v. Brown, 37 N. Y. 225; Gale v. Best, 20 Wis. 44.

3 Broughton v. Mitchell, 64 Ala. 210; Armfield v. Tate, 7 Ired. L. 258; Gibson v. Newman, 2 Miss. 341. The action by the vendor must be prompt, and consistent with the theory that the purchase-money is his, and the land that of the alleged vendee: Scudder v. Waddingham, 7 Mo. App. 26.

4 Bailey v. Clay, 4 Rand. 346.

5 Devling v. Little, 26 Pa. St. 502. But the time of payment may be rendered immaterial by the consent or acquiescence of the parties: Campbell v. Worthington, 6 Vt. 448.

6 Davidson v Van Pelt, 15 Wis. 341. If the vendor stipulates in the contract of sale that the vendee is to have a right of way and other servitudes belonging to the land, he cannot enforce the payment of the price until he has complied with that obligation; Fortier v. Burthe, 19 La. An. 510.

7 Terry v. George, 37 Miss. 539; Sparta Bank v. Agnew, 45 Wis. 131; Batty v. Beebe, 22 Kan. 81. Compare Beecher v. Conradt, 13 N. Y. 108; Hook v. Nebeker, 1 Ind. 257. A vendor under articles of agreement who, on failure of the vendee to pay the first installment due, recovers judgment against him, and on an execution becomes purchaser of the land at sheriff's sale, cannot afterwards enforce the payment of the balance of the purchase-money from the vendee or from his estate: Graff v. Kelly, 43 Pa. St. 453.

§ 398. Defenses to action for purchase-money. —It has frequently been held that want of title in the vendor is a good defense at law to an action on a bond or note given for the purchase-money of land.[1] And a failure of title in part has been usually held to constitute a *pro tanto* defense against payment of the purchase-money.[2] The vendee may show that the vendor was not the owner of the land on the day when the deed was to be delivered and the note paid.[3] But it is held to be no defense to a note given for the purchase-money, and payable before the time for the making of the deed, that the vendor has no title to the land.[4] So it is no defense that the vendor had no title, the vendee having had full knowledge of the title when he bought, unless there was fraud.[5] Nor can the vendee defend a suit on the note on the ground of a failure of title, and still retain the land and enjoy the profits.[6] So a vendee of land under a parol contract who has given his note for the purchase-

money, and been let into possession, cannot avoid its payment on the ground that the contract is void by the Statute of Frauds.[7] A parol contract for the sale of land is voidable merely, not absolutely void.[8] And as a general rule, one who has gone into possession of land under a contract of sale cannot retain possession under the contract and yet avoid payment of the balance of the purchase-money on the ground that the vendor cannot give him a good title as agreed.[9] To avail himself of such defense, the vendee must offer to rescind the contract;[10] and he cannot resist the plaintiff's right to recover on the ground of a failure of title as to a portion of the property, if he has disabled himself from placing his vendor *in statu quo* by conveying the title to a third party.[11] But if the vendor has conveyed away his title without notice to the vendee, so as to be unable to fulfill his bond to convey, it is a good defense to an action for the purchase-money.[12]

1 Gorham *v.* Reeves, 3 Ind. 83; Lewis *v.* McMillen, 31 Barb. 395; Miles *v.* Stevens, 3 Pa. St. 21; Myers *v.* Aikman, 3 Ill. 452; Wellman *v.* Dismukes, 42 Mo. 101; Knepper *v.* Kurtz, 58 Pa. St. 480; Combs *v.* Fisher, 3 Bibb, 51; Stiles *v.* Sherman, 34 Me. 344.

2 Wilkerson *v.* Chadd, 14 Ind. 448; White *v.* Lowry, 27 Pa. St. 254; Morgan *v.* Smith, 11 Ill. 194; Stiles *v.* Sherman, 34 Me. 344; Miller *v.* Tate, 12 La. An. 160; Barnes' Appeal, 46 Pa. St. 350. In Maine, it is held to be no defense, either in whole or in part, to a note given for land conveyed by a *warranty* deed, that the title to the land has partially failed: Morrison *v.* Jewell, 34 Me. 146. See also Wiley *v.* Howard, 15 Ind. 169; Glenn *v.* Thistle, 23 Miss. 42; Whitney *v.* Lewis, 21 Wend. 131; Picket *v.* Picket, 6 Ohio St. 525; Lamerson *v.* Marvin, 8 Barb. 9; Patton *v.* England, 15 Ala. 69. In Alabama, in the absence of fraud, mistake, or warranty, defect or failure of title in the vendor is not available to the vendee to defeat or abate recovery for the purchase-money of lands: Tobin *v.* Bell, 61 Ala. 125; and see Greenleaf *v.* Cook, 2 Wheat. 16; Abbott *v.* Allen, 2 Johns. Ch. 519; Trumbo *v.* Lockridge, 4 Bush, 415.

3 Gorham *v.* Reeves, 3 Ind. 83; Overly *v.* Tipton, 68 Ind. 410.

4 Harrington *v.* Higgins, 17 Wend. 376; Wiley *v.* Howard, 15 Ind. 169; Taylor *v.* Johnson, 19 Tex. 351; Reid *v.* Davis, 4 Ala. 83.

5 Pennock *v.* Claypole, 1 Phila. 15; Neel *v.* Prickett, 12 Tex. 137; Bryan *v.* Osborne, 61 Ga. 51.

6 McDaniel *v.* Bryan, 8 Ill. App. 273; LaForge *v.* Mathews, 68 Ill. 328. And see Delaney *v.* McDonald, 47 Wis. 108; Staley *v.* Ivory, 65 Mo. 74.

7 Gillespie *v.* Battle, 15 Ala. 276; Byers *v.* Aiken, 5 Ark. 419; Holland *v.* Hoyt, 14 Mich. 238; McGowan *v.* West, 7 Mo. 569; Curran *v.* Curran, 40 Ind. 473.

8 Curran v. Curran, 40 Ind. 473; Sawyer v. Ware, 36 Ala. 675. Compare Bates v. Terrell, 7 Ala. 129.

9 Taft v. Kessel, 16 Wis. 273; Helvenstein v. Higgason, 35 Ala. 259; Wiley v. Howard, 15 Ind. 169; Worthington v. Curd, 22 Ark. 277; Picket v. Picket, 6 Ohio St. 525; Timms v. Shannon, 19 Md. 296; Wauser v. Messler, 29 N. J. L. 256; McIndoe v. Morman, 26 Wis. 588. Compare Cross v. Noble, 67 Pa. St. 74; Negley v. Lindsay, 67 Pa. St. 217.

10 Lynch v. Baxter, 4 Tex. 431; Smith v. Busby, 15 Mo. 387; McIndoe v. Morman, 26 Wis. 588. Compare Gans v. Renshaw, 2 Pa. St. 34.

11 M'Keen v. Beaupland, 35 Pa. St. 488.

12 Banks v. Ammon, 27 Pa. St. 172; Chandler v. Marsh, 3 Vt. 161.

§ 399. Recovery back of purchase-money.—The cases in which a vendee may recover back money paid on a contract for the purchase of land are thus enumerated: (1) where the rescission of the contract is voluntary, and by mutual consent; (2) where the vendor is incapable or unwilling to perform the contract on his part; or (3) where the vendor has been guilty of fraud in making the contract.[1] In either of these cases the law implies a promise on the part of the vendor to refund the money.[2] But if he has in all respects performed his contract, and the rescission is entirely in consequence of the unexpected default of the vendee in making further payments, it is held that the latter cannot recover back the money paid by him.[3] One who is in the quiet possession of land under a contract of sale, and having paid the purchase-money, cannot recover it back.[4] Before an action can be maintained therefor, the plaintiff must have been evicted, or have voluntarily surrendered or offered to surrender possession.[5] He cannot hold on to the property and at the same time recover back what he paid.[6] But after an offer by him to rescind the contract and to surrender possession, he may then recover what he has paid, with interest and the value of his improvements, less the value of his use and occupation.[7] It has generally been held that a party who advances money on an oral contract for the sale of land cannot recover it back if the other party is able and willing to fulfill the contract on his part.[8] But a different rule is adopted in Alabama, and it is there held that if the vendor in fact had no title,

the purchaser may, so long as the contract is executory, whether it was verbal or written, repudiate it altogether, and recover back the money paid under it.[9] To warrant an action for money had and received for the recovery back of money paid under a special contract to convey land, it is held that as strict a performance must be shown by the plaintiff as if he had sued on the contract;[10] unless it has been either expressly rescinded or impliedly so, as by nothing having been done under it for a long time, or by the defendant having acted inconsistently with it.[11]

1 Welles, J., in Battle *v.* Rochester City Bank, 5 Barb. 414. Compare Baston *v.* Clifford, 68 Ill. 67; 18 Am. Rep. 547; Bryson *v.* Crawford, 68 Ill. 362; McIndoe *v.* Morman, 26 Wis. 588; Newsome *v.* Graham, 10 Barn. & C. 234; Lyon *v.* Annable, 4 Conn. 350; Kerr *v.* Kitchen, 7 Pa. St. 486; Force *v.* Dutcher, 18 N. J. Eq. 401; Pipkin *v.* James, 1 Humph. 325; Wilhelm *v.* Fimple, 31 Iowa, 131; 7 Am. Rep. 117; Wheeler *v.* Mather, 56 Ill. 241; 8 Am. Rep. 682.

2 Abbott *v.* Draper, 4 Denio, 51; Tice *v.* Zinsser, 76 N. Y. 549; Beaman *v.* Simmons, 76 N. C. 43. When the title partially fails, the vendee may recover back a proportional share of the purchase-money paid: Michael *v.* Mills, 17 Ohio, 601. And see Timby *v.* Kinsey, 18 Hun. 255. A vendee in an executory contract for the sale of lands cannot recover a portion of the purchase-money paid by him where the buildings on the land have been destroyed by fire without the vendor's fault, after such payment and the payment of the balance, where it does not appear that the buildings formed the chief inducement to the purchase: Bautz *v.* Kuhworth, 1 Mont. 133; 25 Am. Rep. 737. But the vendee in such case is not bound to take the lands and pay the notes given for the purchase-money, though the vendor is entitled to the value of the use and occupancy during the vendee's possession: Gould *v.* Murch, 70 Me. 288; 35 Am. Rep. 325. Compare Wells *v.* Calnan, 107 Mass. 514; 9 Am. Rep. 65.

3 Battle *v.* Rochester City Bank, 5 Barb. 414; and see Page *v.* McDonnell, 55 N. Y. 299; 46 How. Pr. 299; Haynes *v.* Hart, 42 Barb. 58.

4 Cope *v.* Williams, 4 Ala. 362; McIndoe *v.* Mormon, 26 Wis. 588; 7 Am. Rep. 96; Long *v.* Saunders, 88 Ill. 147. But this rule applies only to a valid contract of sale, and not to a contract void for want of consent, and entered into in error produced by the fraud of the opposite party: Formento *v.* Robert, 27 La. An. 489.

5 Haynes *v.* White, 55 Cal. 38; Jones *v.* Noe, 71 Ind. 368. But compare Johnston *v.* Powell, 34 Tex. 528.

6 Long *v.* Saunders, 88 Ill. 147; Purdy *v.* Bullard, 41 Cal. 444; Summerall *v.* Graham, 62 Ga. 729.

7 McIndoe *v.* Morman, 26 Wis. 588; 7 Am. Rep. 96; Pino *v.* Beckwith, 1 New Mex. 19; Witherspoon *v.* M'Calla, 3 Desaus. Eq. 245; Bryant *v.* Boothe, 30 Ala. 311; Simpson *v.* Belvin, 37 Tex. 674; McDonald *v.* Beall, 55 Ga. 288. Compare White *v.* Tucker, 52 Miss. 145.

8 Gammon *v.* Butler, 48 Me. 344; Plummer *v.* Breckman, 55 Me. 105; Venable *v.* Brown, 31 Ark. 564; Coughlin *v.* Knowles, 7 Met. 57; Galvin *v.* Prentice, 45 N. Y. 162; Galway *v.* Shields, 66 Mo. 313; Wetherbee *v.* Potter, 99 Mass. 354. See Thomas *v.* Brown, L. R. 1 Q. B. D. 714.

9 Flinn *v.* Barber, 64 Ala. 193.

10 Green *v.* Green, 9 Cowen, 46; and see Hartley *v.* James, 50 N. Y. 38; Page *v.* McDonnell, 55 N. Y. 303, 304; Bellows *v.* Cheek, 20 Ark. 424.

11 Green *v.* Green, 9 Cowen, 46. Where one has been induced by fraud to enter into a contract for the purchase of land, he may sue to recover back his money without giving notice of his intent to rescind, nothing having been done under the contract except the payment of the money sued for: Herbert *v.* Stanford, 12 Ind. 503. See Camp *v.* Pulver, 5 Barb. 91.

§ 400. Action for use and occupation.—Many of the authorities favor the position that one who is let into the possession of land under a contract to purchase is strictly a tenant at will.[1] And it has been further held, that where one enters into such a contract, which is abandoned by him, if his occupation has been beneficial, he will be liable in an action for use and occupation;[2] or the vendor may, at his election, either treat him as a tenant, and recover for use and occupation, or as a trespasser, and eject him by suit.[3] On the other hand, it was held that where there is a contract for the purchase of land, under which the purchaser enters into possession, but afterwards refuses to complete the purchase, the vendor cannot maintain an action of assumpsit against him for use and occupation;[4] but he must resort to an action of trespass and ejectment to recover the mesne profits.[5] And according to many recent decisions, the relation of landlord and tenant does not exist between vendor and vendee where the vendee enters into possession under an executory contract of purchase, and makes default in the payment of the purchase-money;[6] nor does such default entitle the vendor to elect a rescission of the contract, and treat the vendee as a tenant liable for rent.[7] But in such case he has three remedies, all of which he may pursue at the same time, namely: he may maintain ejectment on his legal title, sue at law for the recovery of the purchase-money, and proceed in equity for the enforcement of his lien.[8] The legal consequences of a voluntary rescission of a contract for the sale of land is to restore the parties, as far as practicable, to the

position they would have occupied if no contract had been entered into.[9] The vendee having been in possession is entitled to a return of the purchase-money, and the vendor to a fair rental for the use and occupation of the land, less the value of the permanent improvements placed thereon by the vendee.[10]

1 Right *v.* Beard, 13 East, 210; Waring *v.* King, 8 Mees. & W. 571; Howard *v.* Shaw, 8 Mees. & W. 118; and see §§ 96, 121, *ante*. A vendee under a parol contract of purchase who enters upon land with the permission of the vendor, and under an agreement that he may occupy and work it until the vendor is prepared to convey, is a tenant at will, and as such is entitled to the emblements: Harris *v.* Frink, 49 N. Y. 24; and see Patterson *v.* Stoddard, 47 Me. 355.

2 Hearn *v.* Tomlin, Peake, 192; Davidson *v.* Ernest, 7 Ala. 817; Howard *v.* Shaw, 8 Mees. & W. 118; and see Knowles *v.* Shapleigh, 8 Cush. 333; Wright *v.* Roberts, 22 Wis. 161; Smith *v.* Wooding, 20 Ala. 324; Rider *v.* Union India Rubber Co. 28 N. Y. 379.

3 Seabury *v.* Stewart, 22 Ala. 207.

4 Smith *v.* Stewart, 6 Johns. 46; Dixon *v.* Haley, 16 Ill. 145; Miles *v.* Elkin, 10 Ind. 329; Stacy *v.* Vermont etc. R. R. Co. 32 Vt. 551; Kyle *v.* Kyle, 3 Hun, 460; Greenup *v.* Vernor, 16 Ill. 26; Rogers *v.* Wiggs, 12 Mon. B. 504; Kirtland *v.* Pounsett, 2 Taunt. 145; Winterbottom *v.* Ingham, 7 Q. B. 611.

5 Smith *v.* Stewart, 6 Johns. 46; McNair *v.* Schwartz, 16 Ill. 24; Thompson *v.* Bower, 60 Barb. 477.

6 Thompson *v.* Bower, 60 Barb. 477; Kyle *v.* Kyle, 3 Hun, 460; Tucker *v.* Adams, 52 Ala. 254; Brewer *v.* Craig, 18 N. J. L. 214; and see Moore *v.* Harvey, 50 Vt. 297; Dennett *v.* Penobscot Fair Ground Co. 57 Me. 425; 2 Am. Rep. 53. Nor can a tenancy be implied from the circumstance of a vendor remaining in possession of premises after a sale so as to enable the vendee to maintain an action for use and occupation: Greenup *v.* Vernor, 16 Ill. 26.

7 Tucker *v.* Adams, 52 Ala. 254.

8 Doe *v.* McLoskey, 1 Ala. 708; Tucker *v.* Adams, 52 Ala. 254; and see § 394, *ante*.

9 Smith *v.* Stewart, 83 N. C. 406.

10 Smith *v.* Stewart, 83 N. C. 406; and see Patrick *v.* Roach, 21 Tex. 251. So where a vendee succeeds in obtaining the rescission of a contract on the ground of fraud, he is chargeable with the rent of the land during the time he held possession of it, and is entitled to a credit for valuable and permanent improvements erected thereon by him: Thompson *v.* Lee, 31 Ala. 292; and see Wood *v.* Krebbs, 33 Gratt. 685; McCarty *v.* Moorer, 50 Tex. 287; Jones *v.* Hutchinson, 21 Tex. 370; Coffman *v.* Huck, 19 Mo. 435. But when a party obtains the title and possession of land by fraudulent representations, he should be treated as having entered with full knowledge that his entry was without right; he should be charged with rents, and should not be allowed for meliorations or improvements made by him: Moseley *v.* Miller, 13 Bush, 408.

§ 401. Damages for failure to convey.—The general rule which prevails in England and in this country

is that, if the contract for the sale of land was made in good faith, and the vendor for any reason is unable to perform it and is guilty of no fraud, the vendee is limited in his recovery to the purchase-money and interest;[1] with, perhaps, in addition, the costs of investigating the title.[2] On a covenant to convey, as on a covenant of seizin, the measure of damages is, in the absence of fraud, the purchase-money and interest;[3] and the purchaser is entitled to no satisfaction for the loss of his bargain.[4] In cases where no part of the purchase-money has been paid, he can recover only nominal damages.[5] But if the vendor is guilty of fraud, or can convey but will not, or if he has covenanted to convey when he knew he had no authority to contract to convey, or refuses to remedy a defect in his title which is in his power to do, or refuses to incur expenses which would enable him to fulfill his contract—in all these cases he is liable to the vendee for the loss of the bargain;[6] the proper measure of damages is the value of the land at the time of the breach.[7] So the general rule adopted in some of the States is, that where a vendor contracts to sell lands for a stipulated price at a certain time, and upon the arrival of the appointed time is for any reason unable to convey, in an action by the vendee to recover for a breach of the contract the true measure of damages is the value of the land at the time the conveyance was to be made.[8] And this rule applies in case of an agreement to exchange lands, and one of the parties knew at the time that he had no title to the land which he agreed to convey,[9] or having title, refused to convey in pursuance of the bargain of exchange.[10] In Pennsylvania, the measure of damages for the breach of a parol contract to convey land, in the absence of fraud, is the consideration and compensation for improvements in reliance on the contract, deducting a reasonable rental of the premises.[11] The right of action accrues when the vendor conveys to a stranger;[12] but in order to recover damages for the breach of a parol contract to convey land,

the evidence of the contract must be clear, satisfactory, and unambiguous.[13] And compensation for breach of contract to convey will, in general, be denied where the party asking it had notice at the time the contract was made that the vendor was agreeing for more than he could give or convey, and it appears that the vendee has not, in consequence of the contract, placed himself in a situation from which he cannot extricate himself without loss.[14] So a vendor in good faith, believing he has title, covenanting to convey land, and discovering, before any part of the consideration money is paid, a defect in his title, is not liable to damages for a refusal to convey.[15]

1 Flureau *v.* Thornhill, 2 Black. W. 1078; Bain *v.* Fothergill, L. R. 6 Ex. 59; S. C. aff'd, L. R. 7 Eng. & Ir. App. 158; Walker *v.* Moore, 10 Barn. & C. 416; Engel *v.* Fitch, L. R. 3 Q. B. 314; Hall *v.* Delaplaine, 5 Wis. 206; Thompson *v.* Guthrie, 9 Leigh, 101; Kelly *v.* Bradford, 3 Bibb, 317; Blackwell *v.* Lawrence Co. 2 Blackf. 143; Bush *v.* Cole, 28 N. Y. 261; Mack *v.* Patchin, 42 N. Y. 167; 1 Am. Rep. 506; Pumpelly *v.* Phelps, 40 N. Y. 59; Hammond *v.* Hannin, 21 Mich. 374; Thompson *v.* Sheplar, 72 Pa. St. 160.

2 Hammond *v.* Hannin, 21 Mich. 374. Where a vendor fails to make a good title within the time agreed, and the vendee dies, his executor may sue for damage incurred by loss of interest on the deposit money, and the expense of investigating the title: Orme *v.* Broughton, 10 Bing. 533.

3 Herndon *v.* Venable, 7 Dana, 371; Dunnica *v.* Sharp, 7 Mo. 71; Stewart *v.* Noble, 1 Greene, 26; and see § 318, *ante*.

4 Flureau *v.* Thornhill, 2 Black. W. 1078; Bain *v.* Fothergill, L. R. 6 Ex. 59; S. C. aff'd, L. R. 7 Eng. & Ir. App. 158; Drake *v.* Baker, 34 N. J. L. 358.

5 Mack *v.* Patchin, 42 N. Y. 167; 1 Am. Rep. 506; Conger *v.* Weaver, 20 N. Y. 140; Cockcroft *v.* N. Y. etc. R. R. Co. 69 N. Y. 201.

6 Bitner *v.* Brough, 11 Pa. St. 127; Hopkins *v.* Grazebrook, 6 Barn. & C. 31; Davis *v.* Lewis, 4 Bibb, 456; Trull *v.* Granger, 8 N. Y. 115; Stanton *v.* Miller, 14 Hun, 383; Burr *v.* Todd, 41 Pa. St. 206; Martin *v.* Wright, 21 Ga. 504; Lock *v.* Furze, Law R. 1 Com. P. 441; Engel *v.* Fitch, Law R. 3 Q. B 314; Pumpelly *v.* Phelps, 40 N. Y. 60; Robinson *v.* Harman, 1 Ex. 849. In a recent English case, it is held that if a person enters into a contract for the sale of land, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot, in an action for breach of the contract, recover damages beyond the expenses he has incurred. Any other damages must be the subject of an action for deceit: Bain *v.* Fothergill, Law R. 6 Ex. 59; S. C. aff'd, L. R. 7 Eng. & Ir. App. 153; overruling Hopkins *v.* Grazebrook, 6 Barn. & C. 31.

7 McConnell *v.* Dunlap, Hardin, 41; Driggs *v.* Dwight, 17 Wend. 71; Cox *v.* Henry, 32 Pa. St. 18; Drake *v.* Baker, 34 N. J. L. 358.

8 M'Kee *v.* Brandon, 3 Ill. 339; Plummer *v.* Rigdon, 78 Ill. 222; Warren *v.* Wheeler, 21 Me. 484; Doherty *v.* Dolan, 65 Me. 87; Kirkpatrick *v.* Downing, 58 Mo. 32; Barnham *v.* Nichols, 3 R. I. 187; Boardman *v.* Keeler, 21 Vt. 84; Wells *v.* Abernethy, 5 Conn. 222; Hopkins *v.* Lee, 6 Wheat. 109.

9 Plummer v. Rigdon, 78 Ill. 222.

10 Burr v. Todd, 41 Pa. St. 206. Compare Fagen v. Davison, 2 Duer, 153; Devin v. Himer, 29 Iowa, 236. When it is proved that the premises to be conveyed by the plaintiff were of less value than those to be conveyed to him by the defendant, this difference of value, together with the expense of examining the title, is the true measure of damages: id.; and see Baker v. Scott, 2 Thomp. & C. 607; Thomas v. Dickinson, 12 N. Y. 364.

11 Bender v. Bender, 37 Pa. St. 419. Compare Hertzog v. Hertzog, 34 Pa. St. 418; Meason v. Kaine, 63 Pa. St. 335; S. C. 67 Pa. St. 126; Malaun v. Ammon, 1 Grant Cas. 123; Harris v. Harris, 70 Pa. St. 170. That the vendee may maintain an action for compensation for his trouble, loss of time, expense, etc., incurred upon the faith that the contract would be consummated, in case the vendor refuses to complete the sale according to the parol agreement, see Welch v. Lawson, 32 Miss. 170.

12 Thurston v. Franklin College, 16 Pa. St. 154; and see Wilson v. Spencer, 11 Leigh, 261. But if the vendee puts it out of the power of the vendor to fulfill the contract, no action lies for the recovery of damages for not conveying: Gibson v. Dunnam, 1 Hill (S. C.) 289.

13 Poorman v. Kilgore, 37 Pa. St. 309.

14 Peeler v. Levy, 26 N. J. Eq. 330; Wiswall v. McGown, 1 Hoff. Ch. 131; Harnett v. Yeilding, 2 Schoales & L. 559.

15 Baldwin v. Munn, 2 Wend. 399.

§ 402. Damages for failure to accept conveyance.—On an executory contract for the sale of real property the vendor cannot recover of the purchaser in default the full contract price, except in an action for specific performance.[1] If the purchaser refuses to accept the deed and pay for the land, and the vendor brings his action at law on the contract, he is entitled to recover such damages only as shall compensate him for the loss of the bargain.[2] In other words, the measure of damages is held to be the difference between the price agreed to be paid for the land and its real value at the time the contract was broken.[3] But it is immaterial whether the plaintiff in such an action keeps or sells the land, and if he sells it, he is not bound to obtain the defendant's consent to the sale, or to consult him in relation thereto.[4] In case of a sale at auction, and a breach of the contract by the vendee, the difference between the price at which the land is first bid off and the price for which it sold at a subsequent and second sale affords a good criterion of damages, though this mode of estimation is not binding upon the jury.[5] Contrary to the general rule above

stated as to the measure of damages where the vendee refuses to perform, it has been held that the vendor is entitled to recover the full purchase-price and interest;[6] and that the vendee cannot limit him to the actual damages sustained by reason of the breach.[7]

1 Congregation Beth Elohim *v.* Central Presbyterian Church, 10 Abb. Pr. N. S. 484; Porter *v.* Travis, 40 Ind. 556. A vendor may, by an action for the specific performance of a contract against the vendee, compel the acceptance of the conveyance of the land sold, and the payment of the purchase-money: id.

2 Laird *v.* Pim, 7 Mees. & W. 474; Congregation Beth Elohim *v.* Central Presbyterian Church, 10 Abb. Pr. N. S. 484.

3 Laird *v.* Pim, 7 Mees. & W. 474; Griswold *v.* Sabin, 51 N. H. 167; Porter *v.* Travis, 40 Ind. 556; Old Colony R. R. Co. *v.* Evans, 8 Gray, 25; Sawyer *v.* McIntyre, 18 Vt. 27.

4 Griswold *v.* Sabin, 51 N. H. 167; and see Baney *v.* Killmer, 1 Pa. St. 30; 44 Am. Dec. 109.

5 Adams *v.* McMillan, 7 Port. 73. Compare Alna *v.* Plummer, 4 Me. 258.

6 Richards *v.* Edick, 17 Barb. 260; Oatman *v.* Walker, 3 Me. 67; and see Robinson *v.* Heard, 15 Me. 296.

7 Lawrence *v.* Miller, 86 N. Y. 131. The vendee in a contract for the sale of land, having made default, cannot recover back any part of the sum paid by him on the contract: Lawrence *v.* Miller, 86 N. Y. 131. Where one conveys lands to another under a parol agreement not to be performed within one year, and so void under the Statute of Frauds, if after a partial performance the grantee repudiates the agreement, the grantor can recover the value of the lands, deducting therefrom the value of the partial performance: Day *v.* N. Y. Cent. R. R. Co. 51 N. Y. 583; Same *v.* Same, 22 Hun, 412.

§ 403. Liquidated damages, and penalty.—Parties to a contract for the purchase and sale of land, as in other contracts, may adjust in advance the damages to result from a breach of the agreement, and may prescribe in the agreement itself what shall be the damages which he who violates the contract shall pay to the other.[1] Damages thus mutually adjusted or agreed upon by the parties in advance are termed liquidated or stipulated damages;[2] and it is held that where an agreement declares that the party in default shall pay to the other party a given sum as "liquidated damages," such sum, *prima facie*, is to be treated as damages, and not as a penalty.[3] The use of the term "penalty," or "liquidated damages," is not, however, conclusive to show the true character of the sum agreed to be paid in the event of non-performance.[4]

The court must in each case gather from the whole instrument what was the real intention of the parties;[5] and will refuse to hold itself bound by the mere use of the term "liquidated damages," but will look to what must be considered in reason to have been intended by the parties in relation to the subject-matter.[6] If, however, it be manifest that the parties meant the sum fixed to be liquidated damages, the court will not interfere to frustrate that intention.[7] While, on the other hand, if it be doubtful upon the whole agreement whether the sum named was intended to be a penalty or liquidated damages, it will be construed to be a penalty;[8] it being the tendency of the courts to consider the contract as creating a penalty to cover the damages actually sustained by a breach, rather than liquidated damages.[9] Nor will a covenant to pay heavy liquidated damages be extended by implication.[10] In general, a sum of money in gross, to be paid for the non-performance of an agreement,[11] or to secure the prompt performance thereof,[12] is considered a penalty, and not liquidated damages,[13] and more especially when it is expressly reserved as a penalty.[14] So, as a general rule, if the agreement contains disconnected stipulations of various degrees of importance, the sum named will be considered as a penalty, though it is called liquidated damages, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined.[15] So if the instrument provides that a larger sum shall be paid, on the failure of the party to pay a less sum in the manner prescribed, the larger sum is a penalty, whatever may be the language used in describing it.[16] So, as a general rule, if the agreement is not under seal, and the damages are capable of being definitely ascertained, the sum fixed upon as damages in case of violation will be deemed a penalty, though stated to be liquidated damages.[17] But if the damages be necessarily incapable of estimation, and the sum fixed be evidently intended as a compensation for a total failure

to perform, it will be treated as liquidated damages, and not as a penalty.[18] The uncertainty as to the extent of the injury is said to be a criterion by which to determine whether it is a penalty or intended as liquidated damages.[19]

1 See Williams v. Vance, 9 S. C. 374; 30 Am. Rep. 26; Holmes v. Holmes, 12 Barb. 137; Orr v. Churchill, 1 Black. H. 232; Astley v. Weldon, 2 Bos. & P. 346; Pearson v. Williams, 24 Wend. 245; 26 Wend. 630.

2 Dakin v. Williams, 17 Wend. 447; 22 Wend. 201; Lynde v. Thompson, 2 Allen, 456; Boys v. Ancell, 5 Bing. N. C. 390; 7 Scott, 364. Cases of liquidated damages properly occur when the parties have agreed that, in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum as the just, appropriate, and conventional amount of the damages sustained by such act or omission: Gillis v. Hall, 7 Phila. 425; 2 Brewst. 342.

3 Esmond v. Van Benschoten, 12 Barb. 366. Compare Dakin v. Williams, 17 Wend. 447; 22 Wend. 201; Williams v. Vance, 9 S. C. 344, 374; 30 Am. Rep. 26; Tayloe v. Sandiford, 7 Wheat. 13; Dunlop v. Gregory, 10 N. Y. 241.

4 Magee v. Lavell, Law R. 9 Com. P. 115; Watts v. Sheppard, 2 Ala. 425; Hoagland v. Segur, 38 N. J. L. 236; Davis v. Freeman, 10 Mich. 188; Dimech v. Corlett, 12 Moore P. C. C. 199; Davies v. Penton, 6 Barn. & C. 216, 224.

5 Lea v. Whitaker, Law R. 8 Com. P. 70; Chase v. Allen, 13 Gray, 42; Shute v. Hamilton, 3 Daly, 462; Whitfield v. Levy, 35 N. J. L. 145; Noyes v. Phillips, 60 N. Y. 408; Hamaker v. Schroers, 49 Mo. 406; Kemp v. Knickerbocker Ice Co. 69 N. Y. 45; Jaqueth v. Hudson, 5 Mich. 123.

6 Magee v. Lavell, Law R. 9 Com. P. 115; Scofied v. Tomkins, 95 Ill. 190; 35 Am. Rep. 160; Chamberlain v. Bagley, 11 N. H. 234; Gowen v. Garrish, 15 Me. 273; Basyl v. Ambrose, 28 Mo. 39.

7 Lea v. Whitaker, Law R. 8 Com. P. 70; Williams v. Vance, 9 S. C. 344, 374; 30 Am. Rep. 26; Bagley v. Peddle, 5 Sand. 192; Bearden v. Smith, 11 Rich. 550; Crisdee v. Bolton, 3 Car. & P. 240; Dwinell v. Brown, 54 Me. 460.

8 Crisdee v. Bolton, 3 Car. & P. 240; Chaddick v. Marsh, 21 N. J. L. 463.

9 Tayloe v. Sandiford, 7 Wheat. 13; Baird v. Tolliver, 6 Humph. 186; Wallis v. Carpenter, 13 Allen, 19; Spencer v. Tilden, 5 Cowen, 150; and see Shreve v. Brereton, 51 Pa. St. 175; Ricketson v. Richardson, 19 Cal. 330; Colwell v. Lawrence, 38 N. Y. 71; Myer v. Hurt, 40 Mich. 517; Scofield v. Tompkins, 95 Ill. 190.

10 Leggett v. Mut. Life Ins. Co. 53 N. Y. 394.

11 Tayloe v. Sandiford, 7 Wheat. 13.

12 Scofield v. Tompkins, 95 Ill. 190; 35 Am. Rep. 160.

13 Scofield v. Tompkins, 95 Ill. 190; 35 Am. Rep. 160; Tayloe v. Sandiford, 7 Wheat. 13; In re Dagenham Dock Co. Law R. 8 Ch. 1022.

14 Tayloe v. Sandiford, 7 Wheat. 13; Richards v. Edick, 17 Barb. 260; Dennis v. Cumming, 3 Johns. Cas. 297; Brown v. Bellows, 4 Pick. 179.

15 Hoagland v. Segur, 38 N. J. L. 230; and see Magee v. Lavell, Law R. 9 Com. P. 115; Dailey v. Litchfield, 10 Mich. 29; Nash v. Hermosilla, 9 Cal. 584; Berry v. Wisdom, 3 Ohio St. 241.

16 Bagley v. Peddle, 5 Sand. 192; Haldeman v. Jennings, 14 Ark. 329; Mason v. Flint, 2 Minn. 350; Cairnes v. Knight, 17 Ohio St. 69; Davis v. Hendrie, 1 Mont. 499.

17 Graham *v.* Bickham, 2 Yeates, 32; 4 Dall. 149; Pinkerton *v.* Caslon, 2 Barn. & Ald. 704; Spencer *v.* Tilden, 5 Cowen, 144, 150, n.; Gillis *v.* Hall, 7 Phila. 422; 2 Brewst. 342.

18 Fox *v.* Snyder, 9 Phila. 285; Wolf Creek Diamond Coal Co. *v.* Schultz, 71 Pa. St. 180; and see Clement *v.* Cash, 21 N. Y. 253; Staples *v.* Parker, 41 Barb. 648; Streeper *v.* Williams, 48 Pa. St. 450; Lange *v.* Week, 2 Ohio St. 519, 535; Bright *v.* Rowland, 4 Miss. 398.

19 Powell *v.* Burroughs, 54 Pa. St. 329.

§ 404. Costs.—The rule that prevails universally at law is, that the costs shall abide the event of the action by the vendor or vendee.[1] So upon a suit in equity, *prima facie*, the prevailing party is entitled to costs, and the party who fails is liable therefor.[2] But costs do not always follow a decree in favor of a party, but are to be awarded or refused in the sound discretion of the court, according to the justice of each particular case.[3] A party who depends upon circumstances to govern the discretion of the court in withholding costs must, however, show the existence of those circumstances in a sufficient degree to do away with the *prima facie* claim of costs.[4] Costs will not be awarded to either party where both are in fault;[5] or are equally innocent;[6] or in proceedings in the nature of amicable suits;[7] or where the practice on the subject is new and unsettled.[8] A purchaser has a right to require a marketable title;[9] and if brought into court upon a doubtful title, he ought to be discharged with costs.[10] And in general, where the purchaser makes a fair objection to the title, although he fails in the objection, no costs should be allowed to the vendor;[11] otherwise, if the objections are frivolous, and specific performance is decreed in favor of the vendor.[12] It is a general rule that the vendee if successful in a suit for specific performance is entitled also to costs;[13] but not unless he has made a demand of performance, and has tendered the purchase-money before bringing the suit.[14] A vendor who brings suit for a specific performance, but fails to deliver an abstract of his title, will not be allowed costs although he succeeds in the suit;[15] and so if the abstract delivered be insufficient.[16] The heirs of

a party in an action for specific performance, it appearing that there was no improper behavior or unjustifiable defense, should not be charged with costs.[17] So a case between husband and wife is held not to be a case for costs.[18] And where a suit for specific performance is rendered necessary by the mere act of God, as where a vendor dies intestate or becomes a lunatic, the decree is generally made without costs to either side.[19] Where a purchaser obtains a bargain at an inadequate price, although the court may be bound to enforce it, yet it will do so without costs against the vendor, whose estate the purchaser obtained at an undervalue.[20] And if the purchaser's bill is dismissed because of his dishonorable conduct in the transaction, costs will be awarded against him.[21] And where a bill was filed by a vendor for specific performance, and the vendee claimed that the contract had been abandoned—failing in this defense, he was ordered to pay the costs of the suit up to the hearing.[22] So if there was an objection to the title not disclosed in the contract, but waived by the purchaser, he would be charged with the costs if he resisted a specific performance upon the objection so waived.[23] And where a vendor's bill for specific performance is dismissed with costs for want of a sufficient title, yet if the vendee, as a defense, has set up fraud and misrepresentation, which are disproved, he will be liable for the costs occasioned by that defense.[24]

1 See White *v.* Walker, 5 Fla. 478, 503; Hunter *v.* Marlboro, 2 Wood. & M. 168; Clark *v.* Reed, 11 Pick. 449; McReynolds *v.* Cates, 7 Humph. 29.

2 Decker *v.* Casley, 2 N. J. Eq. 446; Gray *v.* Gray, 15 Ala. 779; Thrall *v.* Chittenden, 31 Vt. 183; Saunders *v.* Frost, 5 Pick. 259; Stone *v.* Locke, 48 Me. 425; Lee *v.* Prindle, 11 Gill & J. 288; Ward *v.* Davidson, 2 Marsh. J. J. 443; Van Couver *v.* Bliss, 11 Ves. 458; Hampson *v.* Brandwood, 1 Madd. 394; Hunn *v.* Norton, 1 Hopk. Ch. 344.

3 Cowles *v.* Whitman, 10 Conn. 121; Travis *v.* Waters, 12 Johns. 300; Brooks *v.* Byam, 2 Story, 554; Van Couver *v.* Bliss, 11 Ves. 458; Edelsten *v.* Edelsten, 1 De Gex, J. & S. 185; Hilton *v.* Woods, Law R. 4 Eq. 432; Clarke *v.* Hart, 6 H. L. Cas. 633; Patch *v.* Ward, 3 Ch. App. 203; Caton *v.* Caton, Law R. 1 Ch. 149; Burgh *v.* Kenny, 1 Ir. Eq. 264. After a final decree in favor of a party, there must also be an express order or decree for his costs, or they are lost: Stone *v.* Locke, 48 Me. 425.

4 Van Couver *v.* Bliss, 11 Ves. 458, 461; and see Clark *v.* Reed, 11 Pick. 449; Robinson *v.* Cropsey, 2 Edw. Ch. 138.

5 Caldwell *v.* Leiber, 7 Paige, 483; Clark *v.* Reed, 11 Pick. 449; Pinnock *v.* Clough, 16 Vt. 500; Nicoll *v.* Huntington, 1 Johns. Ch. 166; Johnson *v.* Taber, 10 N. Y. 319. If both parties have acted foolishly, or have been equally imprudent, costs are refused: Hitchcock *v.* Giddings, 4 Price, 135.

6 Pendleton *v.* Eaton, 3 Johns. Ch. 69; Clay *v.* Richardson, 2 Marsh. A. K. 199. No costs are allowed to either party where each makes an unfounded claim against the other: Ten Eyck *v.* Holmes, 3 Sand. Ch. 428; Spencer *v.* Spencer, 11 Paige, 299.

7 McConnell *v.* McConnell, 11 Vt. 290. So where the parties settle the subject-matter of the suit between themselves out of court, without any arrangement as to the costs, each party pays his own costs: Den *v.* Pidcock, 12 N. J. L. 263; Bruce *v.* Gale, 13 N. J. Eq. 211; Eastburn *v.* Kirk, 2 Johns. Ch. 317.

8 Hoffman *v.* Skinner, 5 Paige, 526.

9 Swayne *v.* Lyon, 67 Pa. St. 436; Richmond *v.* Gray, 3 Allen, 25; Allen *v.* Atkinson, 21 Mich. 351; Smith *v.* Turner, 50 Ind. 367; Gaus *v.* Renshaw, 2 Pa. St. 34; 44 Am. Dec. 152.

10 Bloose *v.* Clanmorris, 3 Bligh, 62. Compare Sherwin *v.* Shakespeare, 17 Beav. 267; Abbott *v.* Sworder, 4 De Gex & S. 443; Monro *v.* Taylor, 8 Hare, 51.

11 Thorp *v.* Freer, 4 Madd. 466; Aislabie *v.* Rice, 3 Madd. 256; Cox *v.* Chamberlain, 4 Ves. 631. Compare Weddall *v.* Nixon, 17 Beav. 160; Calverley *v.* Williams, 1 Ves. 210; Fludyer *v.* Cocker, 12 Ves. 25.

12 Thorp *v.* Freer, 4 Madd. 466; and see Biscoe *v.* Wilks, 3 Mer. 456.

13 Hart *v.* Brand, 1 Marsh. A. K. 162.

14 Dustin *v.* Newcomer, 8 Ohio, 49; Galloway *v.* Barr, 12 Ohio, 354; Swartwout *v.* Burr, 1 Barb. 495; Bruce *v.* Tilson, 25 N. Y. 194.

15 Winne *v.* Reynolds, 6 Paige, 407; Scott *v.* Thorp, 4 Edw. Ch. 1; Wynn *v.* Morgan, 7 Ves. 202; Newall *v.* Smith, 1 Jacob & W. 263.

16 Wilson *v.* Clapham, 1 Jacob & W. 36.

17 Dyer *v.* Potter, 2 Johns Ch. 152; and see Sutphen *v.* Fowler, 9 Paige, 280.

18 See Garey *v.* Whittingham, 5 Beav. 268; Vansittart *v.* Vansittart, 4 Kay & J. 62; but see S. C. 2 De Gex & J. 258.

19 Hinder *v.* Streeten, 10 Hare, 18; Purser *v.* Darby, 4 Kay & J. 44; Cresswell *v.* Haines, 8 Jur. N. S. 208.

20 Burrowes *v.* Lock, 10 Ves. 470.

21 Davis *v.* Symonds, 1 Cox Ch. 402.

22 Wright *v.* Howard, 1 Sim. & St. 190, 205; McMurray *v.* Spicer, Law R. 5 Eq. 527.

23 Burnell *v.* Brown, 1 Jacob & W. 168, 175.

24 Wright *v.* Howard, 1 Sim. & St. 190, 205; and see West *v.* Jones, 1 Sim. N. S. 205; Douglass *v.* Culverwell, 3 Giff. 251; Marshall *v.* Sladden, 7 Hare, 428, 444; Stainland *v.* Willott, 3 McN. & G. 664; New Brunswick etc. Railway Co. *v.* Conybeare, 9 H. L. Cas. 711; Griggs *v.* Staplee, 2 De Gex & S. 572, 590.

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